Supreme Court, U.S.
FILED

No. 011486 APR - 4 2002

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

BEVERLY B. MANN,

Petitioner,

v.

THE UPJOHN COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT, AND THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED

1. Does a state appellate court that lacks the legal authority and the procedural apparatus to serve as a fact-finding court commit an *ultra vires* act and thus violate the Fourteenth Amendment's due process guarantee by resolving disputed issues of fact, in some instances by reversing trial-court findings (in this case, wholesale), that were not at issue in the appeal, and by then basing its resolution of the appeal upon those findings?

2. Does a state appellate court commit an *ultra vires* act and thus violate the Fourteenth Amendment's due process and equal protection guarantees by declining to consider appeals from judgments and orders – or by basing any ruling whatsoever – upon the basis that the appellant when in the trial court invoked normal, codified procedural rules to make common objections to discovery demands, most of which were sustained and none of which was ruled ethically or procedural improper, and to move (successfully on two occasions and unsuccessfully on another one) for judicial recusal?

3. Does a state appellate court commit an *ultra vires* act and thus violate the Fourteenth Amendment's due process and equal protection guarantees by declining in *non sequitur* fashion to consider appeals from judgments and orders on the basis of its own factual findings on issues unrelated to those it is declining to consider?

4. Does a right that is clearly and narrowly articulated by a provision of a state constitutional (as here) or by a state statute (also as here) create a due process property interest in those to whom it pertains?

5. Does Federal Rule of Evidence 702 and its Advisory Committee Notes concerning the use of expert witnesses articulate not just a federal procedural rule but also the parameters of Fourteenth Amendment due process and the Seventh Amendment right to trial by jury with respect to the need (or lack of need) for expert opinion testimony?

6. Do the Fourteenth Amendment's due process and equal protection clauses require that any evidentiary prerequisite to trial, whatever form the prerequisite takes, be based upon the *prima facie* needs in the specific case and not upon a blanket court policy concerning *the manner and cost of obtaining* the necessary evidence?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were as follows:

Appellant: Beverly B. Mann

Appellees: The Upjohn Company

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CONSTITUTIONAL, STATUTORY AND PROCEDURAL-RULE PROVISIONS

1. United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. United States Constitution, Amendment XIV, § 1:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Constitution of the State of Illinois, Article I, Section 2:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

5. Constitution of the State of Illinois, Article VI, Section 4(c)

Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court, or if a division of the Appellate Court certifies that a case decided by it involves a question of such importance that the case should be decided

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by the Supreme Court. The Supreme Court may provide by rule for appeals from the Appellate Court in other cases.

6. Power of courts to make rules. 735 ILCS § 5/1-104 :

(a) The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to, but not inconsistent with the provisions of this Act, and to amend the same, for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure, and power to make rules governing pleading, practice and procedure in small claims actions, including service of process in connection therewith. Unless otherwise indicated by the text, references in this Act to rules are to rules of the Supreme Court.

7. Pleading of punitive damages. 735 ILCS 5/2-604.1:

In all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on any theory or doctrine, where punitive damages are permitted no complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint if the plaintiff establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Any motion to amend the complaint to include a prayer for relief seeking punitive damages shall be made not later than 30 days after the close of discovery. A prayer for relief added pursuant to this Section shall not be barred by lapse of time under any statute prescribing or limiting the time within which an action may be

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brought or right asserted if the time prescribed or limited had not expired when the original pleading was filed.

7. Summary judgments. 735 ILCS 5/2-1005(g):

Amendment of pleading. Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms.

8. Extension of time and continuances. 735 ILCS 5/2-1007:

On good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment. The circumstances, terms and conditions under which continuances may be granted, the time and manner in which application therefor shall be made, and the effect thereof, shall be according to rules. However, in actions involving building code violations or violations of municipal ordinances caused by the failure of a building or structure to conform to the minimum standards of health and safety, the court shall grant a continuance only upon a written motion by the party seeking the continuance specifying the reason why such continuance should be granted. It is sufficient cause for the continuance of any action that any party applying therefor or his or her attorney is a member of either house of the General Assembly during the time the General Assembly is in session, or if any party's attorney is a bona fide member of a religious faith that dictates that the individual refrain from normal business activity or attend religious services as a part of the observance of a religious holiday and requests a continuance to observe such religious holiday when the date of a scheduled court proceeding conflicts with the date of such holiday, or if any party applying therefor or his or her attorney is a delegate to a State Constitutional Convention during the

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time the Constitutional Convention is in session, if the presence of such party is necessary for the full and fair trial of the action and, in the case of his or her attorney, if such attorney was retained by such party prior to the time the cause was set for trial.

9. Judgments - Default - Confession. 735 ILCS 5/2-1301:

(e) The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.

10. Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences. Illinois Supreme Court Rule 219

(a) Refusal to Answer or Comply with Request for Production. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on notice to all persons affected thereby, the proponent of the question may move the court for an order compelling an answer. If a party or other deponent refuses to answer any written question upon the taking of his or her deposition or if a party fails to answer any interrogatory served upon him or her, or to comply with a request for the production of documents or tangible things or inspection of real property, the proponent of the question or interrogatory or the party serving the request may on like notice move for an order compelling an answer or compliance with the request. If the court finds that the refusal or failure was without substantial justification, the court shall

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require the offending party or deponent, or the party whose attorney advised the conduct complained of, or either of them, to pay to the aggrieved party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and the court finds that the motion was made without substantial justification, the court shall require the moving party to pay to the refusing party the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Expenses on Refusal to Admit. If a party, after being served with a request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter of fact, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making the proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(i) That further proceedings be stayed until the order or rule is complied with;

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(ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) That a witness be barred from testifying concerning that issue;

(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice;

(vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or

(vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty. When appropriate, the court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under these rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or

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involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.

Where a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

(d) Abuse of Discovery Procedures. The court may order that information obtained through abuse of discovery procedures be suppressed. If a party wilfully obtains or attempts to obtain information by an improper discovery method, wilfully obtains or attempts to obtain information to which that party is not entitled, or otherwise abuses these discovery rules, the court may enter any order provided for in paragraph (c) of this rule.

(e) Voluntary Dismissals and Prior Litigation. A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, opinion witness fees, reproduction costs, travel expenses, postage, and phone charges.

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11. Motions for Continuance.
Illinois Supreme Court Rule 231:

(a) Absence of Material Evidence. If either party applies for a continuance of a cause on account of the absence of material evidence, the motion shall be supported by the affidavit of the party so applying or his authorized agent. The affidavit shall show (1) that due diligence has been used to obtain the evidence, or the want of time to obtain it; (2) of what particular fact or facts the evidence consists; (3) if the evidence consists of the testimony of a witness his place of residence, or if his place of residence is not known, that due diligence has been used to ascertain it; and (4) that if further time is given the evidence can be procured.

(b) When Continuance Will Be Denied. If the court is satisfied that the evidence would not be material, or if the other party will admit the affidavit in evidence as proof only of what the absent witness would testify to if present, the continuance shall be denied unless the court, for the furtherance of justice, shall consider a continuance necessary.

(c) Other Causes for Continuance. It is sufficient cause for the continuance of any action: (1) that, in time of war or insurrection, a party whose presence is necessary for the full and fair prosecution or defense of the action is in the military service of the United States or of this State and that his military service materially impairs his ability to prosecute or defend the action; or (2) that the party applying therefor or his attorney is a member of either house of the General Assembly during the time the General Assembly is in session, if the presence of that party is necessary for the full and fair trial of the action, and in the case of the attorney, if the attorney was retained by the party prior to the time the cause was set for trial.

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(d) Amendment as Cause. No amendment is cause for continuance unless the party affected thereby, or his agent or attorney, shall make affidavit that, in consequence thereof, he is unprepared to proceed to or with the trial. If the cause thereof is the want of material evidence, a continuance shall be granted only on a further showing as may be required for continuance for that cause.

(e) Court's Own Motion. The court may on its own motion, or with the consent of the adverse party, continue a cause for trial to a later day.

(f) Time for Motion. No motion for the continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay.

(g) Taxing of Costs. When a continuance is granted upon payment of costs, the costs may be taxed summarily by the court, and on being taxed shall be paid on demand of the party, his agent, or his attorney, and, if not so paid, on affidavit of the fact, the continuance may be vacated, or the court may enforce the payment, with the accruing costs, by contempt proceedings.

12. Leave to Appeal From the Appellate Court to the Supreme Court. Illinois Supreme Court Rule 315 (a):

(a) Petition for Leave to Appeal; Grounds. Except as provided below for appeals from the Industrial Commission division of the Appellate Court, a petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will

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be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

No petition for leave to appeal from a judgment of the five-judge panel of the Appellate Court designated to hear and decide cases involving review of Industrial Commission orders shall be filed, unless at least one judge of that panel files a statement that the case in question involves a substantial question which warrants consideration by the Supreme Court. A motion asking that such a statement be filed may be filed as a prayer for alternative relief in a petition for rehearing, but must, in any event, be filed within the time allowed for filing a petition for rehearing.

13. Appeals from the Appellate Court to the Supreme Court as of Right. Illinois Supreme Court Rule 317:

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition in the form prescribed by Rule 315, except that the petition shall be entitled "Petition for Appeal as a Matter of Right." Item (1) of the petition shall state that the appeal is taken as a matter of right and item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right. In other respects the procedure is governed by Rule 315. If leave to appeal is to be sought in the alternative, the request therefor must be included in the same petition, and item (1) thereof shall include an alternative prayer for leave to appeal, and item (5)

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the argument as to why in the alternative leave to appeal should be allowed as a matter of sound judicial discretion. When both appeal as a matter of right and leave to appeal are sought, both requests will be disposed of by a single order. If the court allows the petition, briefs, and abstracts in cases in which they are required, shall be filed as provided in the case of appeal by leave under Rule 315.

14. Federal Rule of Evidence 702. Testimony by Experts:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

CITATION TO APPELLATE OPINION

Petitioner Beverly B. Mann filed this lawsuit in the Circuit Court of Cook County, Illinois. Cross-appeals from a variety of trial-court orders were timely filed with the Illinois Appellate Court, First District, which on June 29, 2001, issued an opinion in *Beverly B. Mann v. The Upjohn Company*, 324 Ill. App. 3d 367; 753 N.E.2d 452 (2001). (App. C.) Mann timely appealed to the Illinois Supreme Court as of right under the Constitution of the State of Illinois, Art. VI, sec. 4(c), and alternatively petitioned for discretionary review. That Court on December 5, 2001, rejected the appeal. (App. B.) On February 27, 2002, 7th Circuit Justice John Paul Stevens granted a motion Mann had filed a few days earlier for an extension of time, to and including April 4, 2002, in which to file this petition. (App. A.)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and the Constitution of the United States, Fourteenth Amendment, Section 1.

STATEMENT OF THE CASE

This petition seeks review of the Illinois appellate court's decision to deny Petitioner appellate review of dispositive orders in this litigation upon stated grounds that appear to violate the Fourteenth Amendment's due process and equal protection clauses. The petition also seeks review, under the under those clauses, of the Illinois Supreme Court's failure to comply with a state constitutional mandate to review the appellate court's denial of substantive appellate review of the dispositive trial-court orders.

The petition also requests review of the propriety under the Fourteenth Amendment of a stated court policy of requiring the designation of a paid expert witness by a plaintiff in certain categories of cases as a prerequisite to a trial-date continuance (or to anything else) that is unrelated to any such witness. At issue is a mechanical, generic prerequi-

site unrelated to the establishment of a prima facie case, and required irrespective of the need for such a witness at trial.

*****

This is a pharmaceutical products liability and fraud lawsuit stemming from Petitioner Beverly Mann's use of the prescription sleep medication Halcion continuously for a two-year period beginning in January 1988, and ending in January 1990. The drug is manufactured and distributed by The Upjohn Company. During the period when Mann used the drug, the package insert authorized its use at .5mg., and also authorized its use for an indefinite period of time if the prescription was renewed every 30 days. The drug was prescribed for Mann by her internist at the time, Dr. John Karesh, initially at a dosage of .25mg and then, once the lower dosage had become ineffective for her, at a dosage of .5mg. Dr. Karesh told her (as he acknowledged in his deposition) that the drug had a very low incidence of side effects, lower than any other sleep medication available. He renewed the prescription for her every 30 days.

Since that time, the package insert has been significantly amended on several occasions, at the insistence of the Food and Drug Administration. The amendments to the insert include a substantially lowered recommended dosage of .125 mg, a warning against a dosage of more than .25 mg, and a warning against continuous usage for longer than 10 days. (According to an internal FDA memo dated July 22, 1992, the drug also should not be used in a dosage higher than .125 mg by persons of "small stature (100 pounds)," which Mann was.)

The amendments were mandated because the FDA was receiving reports of certain serious side effects associated with the drug at a rate many times higher than that for the other sleep medications available at the time (or available since then). The side effects that Mann suffered were among them.

Mann, a non-practicing attorney, filed the initial lawsuit *pro se* in Cook County Circuit Court in December 1991, six days before the statute of limitations arguably would run against Upjohn. Nearly two years earlier, when she saw an internist for severe illness with symptoms so odd that neither

Dr. Karesh nor another physician she saw could diagnose it, she was told that her use of Halcion likely was the cause or was a significant contributory cause. The physician, Dr. Joseph Griffin, told her that the drug had so high an incidence of serious side effects that in his opinion it should not be on the market. He also said the drug was highly addictive and that addiction to it could occur after only four consecutive days' use. And he said the drug was by far the most widely prescribed sleep medication in the country and that the drug's manufacturer had engaged in very aggressive marketing of it.

Until August 1991, Mann had harbored doubts about that physician's assessment. But that month internal Upjohn documents obtained in the discovery process in a Halcion lawsuit in Utah were made public and reported in the press. The documents confirmed what that physician had told Mann, and then some. In November 1991, Great Britain revoked its marketing license for the drug and announced startling statistics associating the use of it with numerous serious symptoms, including those Mann had suffered. Mann filed her lawsuit the next month.

She named Upjohn as the sole defendant, opting not to sue her prescribing physician. Upjohn invoked federal diversity jurisdiction to remove the case to federal district court, where it was assigned to (then) District Judge Ann C. Williams. At the first status hearing, the judge ordered Mann to submit a letter to Upjohn's counsel stating the nature and extent of her injury and declaring a monetary settlement demand. The judge also insisted that she retain counsel.

In preparation to comply with the first of those demands, Mann scheduled an appointment with a neurologist, Dr. Albert Ehle, who practiced with the Northwestern University Medical School Faculty Group and who, she was told by a receptionist there, had treated others suffering from Halcion-related side effects. Mann had chosen this medical group because her health insurance plan at the time used the Northwestern Medical Faculty physicians. She did not tell Dr. Ehle that she was involved in litigation stemming from her use of the drug; she said only that she wanted to know her

prognosis for full recovery and whether there was any treatment to eliminate her two remaining side effects. Thus he was a witness but not a paid one – a significant fact here.

In order to comply with the judge's latter demand, Mann retained an attorney named Paul R. O'Malley, a litigator experienced in pharmaceutical-products liability cases. O'Malley, like the other attorneys she contacted, insisted that Dr. Karesh be joined as a defendant; the joinder would destroy federal diversity jurisdiction and enable the lawsuit's voluntary dismissal and its refiling in state court, where O'Malley (and Mann) wanted it litigated. (Illinois law appeared to permit the physician's joinder under the statute of repose.)

O'Malley obtained a voluntary-dismissal order with explicit leave to refile in state court within 60 days adding as defendants Dr. Karesh and the HMO where he had treated Mann. At Upjohn's request, the dismissal order required that Mann respond to a lengthy set of interrogatories that Upjohn had served upon her shortly before. Contrary to the Appellate Court's statement, Mann responded to those interrogatories.

Yet no sooner was the lawsuit refiled than did Upjohn's lawyers serve her with another lengthy set of interrogatories. O'Malley objected on the ground that these were almost entirely duplicative of the ones already answered. The objection was not sustained, Mann was ordered to answer the interrogatories, and she did. No sanction of any type was issued *then, or at any other time in that litigation* – a seminal fact, because, as discussed below, the appellate court suggested otherwise and cited it as a primary basis for its denial to Mann appellate review of her substantive grounds for appeal. (App. C.)

Indeed, during the course of the litigation, Upjohn rained upon her one after another after another set of interrogatories, some of these sets containing approximately 200 interrogatories. Mann filed objections to them, sometimes on substantive grounds, sometimes on procedural grounds: Illinois Supreme Court Rule 213 bars the serving of more than 35 interrogatories without prior *express leave of court*, a provision that Upjohn repeatedly ignored. Time and again –

and again and again – Mann's objections to these sets of interrogatories were *sustained,* in rulings *denying* Upjohn's motions to compel Mann to answer them, and the sets of interrogatories were stricken in their entirely. The sets of interrogatories often were accompanied by lengthy sets of requests to admit (purported) facts, which Mann has described as running along the lines of "Admit that Halcion is the greatest wonder drug since the polio vaccine," and "Admit that Upjohn is the most altruistic organization since the Mother Theresa World Hunger Fund." She objected to every set of them, and every set was *stricken* on her objection. Every single set *in its entirely.*

Yet the appellate court said Upjohn was "forced" to file their motions to compel – the motions that were *denied.* The court thus denied Mann substantive appellate review.

In fact, the appellate court's implications notwithstanding, no discovery sanctions order was ever entered – against either party. Illinois Supreme Court Rule 219, titled "Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences," provides in part that "[w]here a sanction is imposed ... the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." The parties each filed (if memory serves) one or two Rule 219 motions. None was granted.

In sum, Mann was never found to have inappropriately failed to respond to discovery of any sort, to have inappropriately failed to answer requests to admit facts, to have violated the protective order in the case, or to have made false allegations of wrongdoing against her opposing counsel. Had she been, those rulings still could not have served as grounds for the denial of substantive appellate review; codified Illinois law (e.g., Rule 219) and state and federal constitutional due process guarantees would appear to bar that as a sanction. But she was not.

So the word "implied" is the more operative word in the phrase "implied representations". Hinting – as opposed to outright stating – was that court's tactic of choice, its path to

declining to consider Mann's substantive grounds for appeal. Hinting, as opposed to stating, that the trial court had entered particular orders that it did *not* enter, although in some of these instances the trial court actually had entered orders directly to the contrary. Hinting, as opposed to saying, that the trial court had in some other manner made particular findings that it did *not* make, although in some of these instances the trial court actually had made explicit findings directly to the contrary. Hinting, as its tactic for suggesting relevance of apparent irrelevancies – without stating why these things, even if accurate, would have been relevant. That court, in other words, inexplicably and with not even a nod toward explanation either implicitly reversed express findings of fact contained in trial-court orders or it held that that any allegation, any statement of purported fact contained in any motion filed with the trial court, and any facially neutral fact shown the court record could serve as *sua sponte* grounds for the denial of appellate review.

Thus employing this tactic calculated to mislead about the lower court's holdings, the appellate court refused to consider Mann's substantive grounds for appeal because the record on appeal contained motions filed by Upjohn's lawyers alleging certain facts about Mann's manner of litigating the case, and because Mann had accused Upjohn's lawyers of specific instances of impropriety – four instances of which, as reflected in the court record, those lawyers *acknowledged* yet denied constituted impropriety – and because the record reflected facially neutral occurrences to which the appellate court *sua sponte* ascribed a connotation that those facts neither had nor conceivably could have had.

Mann is not certain which of these two alternatives was the court's actual intend because it didn't say. But she challenges them both as violative of the Fourteenth Amendment's due process and equal protection guarantees.

A particularly stunning use of this tactic was that court's perversion of an incident in which Mann presented and then withdrew a motion for leave to name as a paid expert witness a Harvard University Medical School professor named

Quentin Regenstein, M.D., who had written extensively about Halcion. Mann had paid him $700 several months earlier to review and analyze her Halcion-related medical records and her deposition testimony, but for financial reasons she had resisted identifying him as a witness until pressured intensely to name a paid expert witness. At the hearing on her motion, Upjohn counsel Marie Woodbury blurted out that upon receiving Mann's motion she had assigned her associate to phone Regenstein and inquire about his opinion – an unequivocal violation of Illinois discovery and legal ethics rules (as Mann, stunned, pointed out at the hearing). Woodbury said Regenstein told the associate that he did not believe Mann's symptoms were caused by her use of Halcion. Mann withdrew her motion, saying that she needed to speak with Regenstein before proceeding with it. Later that day, she did speak with him, and he said the associate had given him specific information and then asked him his opinion. The information, however, was false. (The information concerned the timing of certain events that were the subject of lengthy litigation in which Mann filed two certiorari petitions with this court after successive appeals. Upjohn wanted to argue that those events rather than Mann's use of Halcion caused her medical symptoms.)

Upjohn did not claim the incident itself as pertinent to any issue on appeal. And Mann mentioned it only as part of her response to Upjohn's *counter-appeal*, which sought reversal of the denial of its summary judgment motion that claimed an insufficiency of evidence that Halcion caused Mann's illnesses. But Mann had memorialized the entire incident for the court record in a motion she filed shortly after it occurred, and a transcript of the hearing also was in the court record.

The appellate court's take on the incident – which, to reiterate, it cited as grounds upon which to deny Mann substantive appellate review: "On February 13, plaintiff filed an emergency motion to designate an opinion witness on causation, which plaintiff was later allowed to withdraw."

The appellate court cited as another of its grounds Upjohn's January 28, 1998, motion seeking "to have facts

deemed admitted based on plaintiff's failure to answer defendant's request for admissions." But the motion was *denied*. Mann established quickly, easily and, in fact (if she recalls correctly), without contest that the set of requests to admit were not sent to her (!). It turned out that a substitute secretary to the attorney responsible for mailing copies of *several* documents, which were filed with the court on December 27, had failed to include in the envelope a copy of the request for admissions. The envelope did include a summary judgment motion to which Mann responded *before* Upjohn filed its motion on the request for admissions, and a large set of interrogatories to which Mann also had responded – by answering some of them and *successfully* objecting to others – before Upjohn filed its admissions-motion.

Once Upjohn's motion to have the facts deemed admitted was *denied*, Mann promptly filed a blanket objection to the entire set of requests. The objection was sustained and the request, like the earlier ones, was *stricken*. Nor did Upjohn claim otherwise to the appellate court. As with the Dr. Regenstein incident, Upjohn did not mention it in the appeal.

And then there was the appellate court's *sua sponte* invocation of Upjohn's Rule 219 motion that claimed Mann had violated the protective order in the case. Mann had responded to that motion by invoking a specific exception provided in the protective order itself. The trial court agreed with Mann's interpretation of the protective order and *denied* Upjohn's motion, yet the appellate court cited that motion among its grounds for denying Mann substantive appellate review. And so on.

But the appellate court didn't mention this incident, although it was documented in the court record and Mann had mentioned it in one of her briefs: Mann learned during a deposition of a medical witness whom Upjohn had obtained a court order to use pursuant to a specific Illinois Supreme Court Rule, Rule 215, that Upjohn's counsel had ordered that witness to forward his notes to a physician who worked regularly for Upjohn's counsel's law firm so that the physician could secretly help draft the statement that the witness was

required by Rule 215 to submit. Rule 215 prohibits such witnesses from forwarding such notes and from communicating with lawyers for any party (or physicians acting on their behalf) before submitting the required statement. The witness stunned Mann and, visibly, Upjohn's counsel when he suddenly produced the faxed letter to him from counsel's associate requesting that he forward his notes to the law firm's physician, and copies of the follow-up faxes between him and that associate lawyer. Copies of those letters were in the record on appeal. And so on.

Nor – an equally seminal fact because, again, the appellate court implied otherwise and cited it as a basis for its decision to deny Mann substantive appellate review – was there ever any judicial finding, either oral or in writing, that Mann lacked sufficient evidence that the drug caused her physiological symptoms, and sufficient evidence of an intensive and broad disinformation campaign conducted by Upjohn about the safety and efficacy of the drug, to proceed to trial.

The appellate court did not itself purport to consider the sufficiency of the evidence; it simply hinted that the trial court had done so and had found the evidence insufficient. But actually, the trial court had found explicitly to the contrary. Time and again, in memorandum opinions *denying* Upjohn's repeated motions to dismiss and *denying* motions for summary judgment that had asserted an insufficiency of the evidence, and in a key (or so it seemed at the time) memorandum opinion *granting* Mann's motion for leave to amend her complaint to request punitive damages pursuant to 735 ILCS § 5/2-604.1, a statute provides:

> In all actions on account of ... product liability based on any theory or doctrine, where punitive damages are permitted no complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint *if the plaintiff establishes at such hearing a reasonable likelihood of*

proving facts at trial sufficient to support an award of punitive damages....

Mann supported her motion with several boxes of documents (including deposition transcripts). The motion was argued at a lengthy semi-private hearing held in a small judicial conference room, as were most of the hearings in this case. (The significance of this will become apparent below.) On October 30, 1997, the court granted Mann's motion, in a memorandum opinion the trial read in part:

> In the present case, Plaintiff's evidentiary foundation for the standard enunciated by statute (the "reasonable likelihood" of proving facts at trial sufficient to support an award of punitive damages) is based on the documents produced by Defendant during discovery and the purported testimony of several independent investigators, including D. Michael Erspamer. *Plaintiff has submitted, both in deposition and documentation format, sufficient factual basis to support her allegations for punitive damages against this Defendant.* In short, when viewed in the light most favorable to Plaintiff, there exists a sufficient factual basis, if proven at trial, to support Plaintiff's position that punitive damages are warranted.... [The standard is] whether there is sufficient evidence to support Plaintiff's theory.... The underlying facts upon which Plaintiff relies have been garnered from the documents produced by Defendant .... The issue of Defendant's purported policy regarding the development, testing, and marketing of the drug at issue has been argued extensively in the voluminous motion practice which has transpired before this court. *The documentation and deposition testimony relied on by Plaintiff are the fruits of aggressive discovery engaged by these parties* and the issues and the theories presented by Plaintiff have been evident throughout the discovery process.... [Emphasis added.]

Upjohn filed a cross-appeal from the denials of its motions to dismiss and for summary judgment but did not appeal from the grant of Mann's § 604.1 motion.

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After Mann's deposition was completed in 1995, the defendants each filed summary judgment motions asserting the running of the statute of limitations. The initial trial date, which was scheduled automatically by a computer, was continued by agreement of the parties to December 5, 1996, because the defendants wanted the summary judgment motions decided before a trial date was set and because the parties did not want to proceed with further discovery before the motions were decided. In February 1996, after extensive briefing and two extended oral arguments, Upjohn's motion was denied and the other defendants' motions were granted. At O'Malley's request, the order granting the summary judgments was not made final and appealable.

Dr. Karesh's deposition had been taken in 1995. Although then still a defendant in the lawsuit, he testified that Mann's illnesses may have been caused or exacerbated by Halcion. In May and June 1996, the depositions of Drs. Ehle and Griffin and another of Mann's treating physicians was taken.

In May 1996, the FDA released a long-awaited investigative report called "The Halcion Task Force Report." The FDA had commissioned the Task Force under public pressure after the surreptitious release by an about-to-retire FDA whistleblower named D. Michael Erspamer in 1994 of the report he had written (and the supporting documents he had compiled) on Halcion as an FDA investigator two years earlier, a report that the agency had buried.

Mann played a role in the springing of the 1996 Task Force Report from the private sanctums of the FDA. (The significance of this will become apparent below.) She enlisted the assistance of a *Wall Street Journal* investigative reporter named Laurie McGinley, who sometimes covered the FDA; (See letters dated May 20, 1996, and May 31, 1996, from Mann to McGinley, at App. D and App. E, which discuss this.) Mann coordinated her effort with veteran Halcion

litigator Michael Mosher, the Texas lawyer mentioned by the Appellate Court in its opinion, who was enlisting the assistance of his local congressman, Rep. Joe Barton, who chaired the House subcommittee that oversees the FDA. The bound report, released on May 31, 1996, and bearing the release date of May 29, 1996, was 70 pages long and had separate bound appendices of several hundred pages, provided smoking-gun statistical evidence as well as evidence of Upjohn's machinations within the FDA concerning the licensing of the drug and the safety warnings for it. According to Barton, it actually had been completed approximately a year earlier; the FDA simply had refused to release it earlier.

Also in May 1996, Upjohn filed three summary judgment motions. One alleged the adequacy of Upjohn's warnings during the relevant time period. Another asserted that because Dr. Karesh (on the advise of his attorney) had declined at his deposition to "speculate" about whether he would have prescribed Halcion for Mann had the drug's warnings back then been as they were at the time of his deposition, Mann could not prove a causal relationship between inadequate warnings and her use of the drug. The third, irrelevant here, concerned a narrow aspect of the claim for economic loss.

Also that month, Upjohn issued a slew of deposition subpoenas and served Mann with one of its huge sets of interrogatories accompanied by a huge set of requests for admissions. Among the subpoenas was one for the deposition of the ex-husband of one of Mann's two sisters, who has lived in Denver since 1969 and is long divorced from Mann's sister. (Mann has never lived in Colorado.) Another was for Mann's law school transcripts. Etc.

In June 1996, fed up with Upjohn's discovery excesses and with her own lawyer's *liassez faire* reaction to them (he was angry and agreed it was well beyond the norm and deliberately oppressive, but thought it was easier to comply with them than to litigate each one), Mann parted ways with him in order to contest each discovery demand she considered inappropriate. She filed *pro se* motions to quash seven or eight subpoenas, and, in response, all but two of the subpoenas *were*

quashed. (A lawyer for the University phoned Mann upon receiving the subpoena and offered to contest it on the school's behalf and on Mann's, but Mann took care of it; Upjohn withdrew the subpoena for her law school records when Mann raised the matter informally at a hearing, before she even filed a motion to quash it.)

Meanwhile Mann and, earlier, O'Malley gathered huge volumes of pertinent Halcion-related documents – from the FDA, from court records in other Halcion litigation, and from Upjohn itself – that supported her allegations. Eventually this included (1) a several-volume deposition of a key Upjohn whistleblower, Dr. William Barry, who had authored several internal Upjohn documents warning of "scary side effects" from the drug and advising against pursuing FDA approval for of it, (2) trial and deposition testimony of other Upjohn executives admitting that they had written certain key internal memos uncovered by FDA investigator Erspamer, (3) a several-hundred-page deposition of Erspamer, (4) internal Upjohn memos detailing Upjohn's purchase of favorable reports by ostensibly independent experts, (5) internal Upjohn memos detailing Upjohn's strategy of discrediting critics of Halcion, and (6) internal Upjohn memos describing the company's tactics of intimidation that killed negative news-media reports about the drug, including a planned expose on PBS and another one on CBS.

Mann also tentatively arranged for the testimony of an FDA epidemiologist named Diane Wysowski, PhD., who had written a lengthy, detailed statistical analysis that compared the reported incidents of specific neurological and psychiatric side effects from Halcion and from each of the other two best-known sleep medications of the 1980s. Wysowski had written the analysis originally as part of her job at the FDA, and then had it published in *The Archives of Internal Medicine*, which is where Mann came across it while researching at the Crerar Library of Health Sciences at the University of Chicago in preparation to respond to the summary judgment motion concerning the adequacy of the warnings. The statistics in the article showed that the rate of incidence of a few of the side

effects was several hundred times greater from Halcion than from the other two medications, and that the incidence of some of the other side effects was tens of times greater from Halcion. Wysowski agreed to testify, free of charge (traveling expenses only), provided that her FDA supervisor approved it.

Meanwhile, extensive pertinent Upjohn internal documents and FDA documents were slowly being uncovered through the discovery process in various other Halcion lawsuits around the country. And in July, 1996, shortly after Mann assumed her own representation, she read an article published in the July 22, 1996, edition of *The National Law* Journal bearing the title, "Upjohn Asks High Court To Protect Halcion Info Megadocument data base is attorney "work product."" The article, which played a key role in the remainder of the litigation, read in part:

> In a high-stakes discovery battle over what constitutes work product, the Upjohn Co. and its defense counsel have asked the U.S. Supreme Court to reverse a Connecticut court ruling that gave a plaintiffs' attorney access to a million-document database on the sleeping pill Halcion.
>
> The Nov. 22, 1995, ruling by New London County Superior Court Judge D. Michael Hurley ordered Upjohn's law firm, Kansas City, Mo.'s Shook, Hardy & Bacon L.L.P., to turn over to the plaintiff a document index and accompanying data base. Citing the work product privilege, Upjohn appealed through the Connecticut courts without success and in May filed a petition for a writ of certiorari to the U.S. Supreme Court. The plaintiff's reply came in June; a decision on cert is not expected until the fall term. Scovish v. Upjohn Co. ... (Super. Ct., New London Co.).
>
> Plaintiffs' attorney Angelo A. Ziotas, of New London's The Reardon Law Firm P.C., brought the underlying suit against Upjohn, alleging Halcion was defective and had caused the 1991 suicide of Walter Scovish, a 59-year-old construction worker. In the course of discovery, Mr. Ziotas learned of the database and sought access to it.
>
> The documents, which total more than 1 million, include clinical data, internal memos and correspondence

that relate to Halcion, which has come under fire in the courts and at the Food and Drug Administration. On May 29, the FDA suggested in a report that the Justice Department investigate whether Upjohn had concealed Halcion safety concerns. Upjohn, facing 155 lawsuits over the drug, insists Halcion is safe....

Judge Hurley rejected Shook Hardy's claim that ordering the release of the database would violate the work product privilege. "The development, testing, manufacture and governmental review of this drug, as the discovery battles of this case demonstrate, produced hundreds of thousands of documents that the plaintiff has a right to review," Judge Hurley ruled....

Mr. Ziotas said he hopes to share the documents with colleagues. He is the chairman of the Association of Trial Lawyers of America's Halcion Litigation Group.

Mann obtained Mr. Ziotas' promise to provide her with copies of all the documents, at a cost to her of $.05 per page, if this Court denied Upjohn's *certiorari* petition.

In August, 1996, when it appeared that Mann was about to win a major victory on a discovery issue, Upjohn moved successfully for reassignment of the case to a special complex litigation subsection of the County court system's Law Division. The case was assigned to Judge Susan Zwick, who, under the structure of the Law Division was to preside in the case until trial, ruling on all pretrial motions of any type *except motions for trial-date continuance*. It was Judge Zwick who, in a series of rulings immediately following the reassignment of the case to her, granted Mann's motions to quash the above-mentioned subpoenas and motions to strike the several sets of interrogatories and requests to admit. (She later granted others as well, as Upjohn kept serving Mann with voluminous sets of those things.) It also was Judge Zwick who ruled on the sufficiency-of-evidence motions mentioned above, including Mann's 735 ILCS § 5/2-604.1 motion.

For motions for trial-date continuance, the Law Division had a separate set of judges – a cadre of five, headed by the

Chief County Judge, Donald P. O'Connell (a key player in this saga). Informally called "the 2005 judges" (so dubbed for one of the two courtrooms where they heard these motions), they met in chambers each morning before the motion call, quietly and unofficially, to receive generic instructions from O'Connell about how to rule on these motions – motions that had not yet been presented to or seen by any judge (including O'Connell). At the meeting, O'Connell would assign himself or another of the five to hear the motion call – usually a call of roughly 40 motions – each morning. The motions were neither briefed nor provided to the judge before the motion was called. The hearing on each motion lasted a few minutes.

At the heart of the appeals in the lower courts were repercussions from a dichotomy between O'Connell's generic policy instructions and codified Illinois law, and between those policy instructions and specific written sufficiency-of-evidence findings by Judge Zwick in Mann's case. Mann argued to the trial court and on appeal that those repercussions implicated Fourteenth and Seventh Amendment rights (as well as state constitutional rights).

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Mann had planned to retain counsel again after the rulings on her motions to quash and to strike, and after what she presumed would be the denial of the two summary judgment motions relevant to this petition. But in the fall of 1996, although discovery was proceeding in the case, there was delay regarding the summary judgment motions.

There also was delay in Upjohn's turning over to Ziotas the database in the *Scovish* case; specifically, Upjohn continued to withhold it under the guise of working out the arrangements. Eventually (in late November, if Mann recalls correctly), Ziotas filed a motion demanding an end to the delay. The motion was granted but the delay continued.

On October 22, 1996, Mann moved to continue the trial date from December 5, citing the apparently imminent production of the Halcion database to Ziotas and his promise to Mann, and the ongoing and active discovery in her case, and her need for trial counsel after the (presumed) denial of

the pending summary judgment motions. She presented her motion to Judge Jacqueline Cox, the 2005 judge assigned to hear the motion call that morning. Upjohn's local counsel objected on the grounds that Mann had not retained a paid medical expert and had not, herself, taken any depositions – points certainly by appearances irrelevant to the grounds Mann had asserted in her motion and seemingly precluded by the express language of 735 ILCS § 5/2-1007, the statute that governs trial-date-continuance motions. That statute provides: "On good cause shown ... additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment. The circumstances, terms and conditions under which continuances may be granted ... shall be according to rules."

Another provision in the Illinois Code of Civil Procedure, 735 ILCS § 5/1-104(a), provides in part, "Unless otherwise indicated by the text, references in this Act to rules are to rules of the Supreme Court." The only Illinois Supreme Court Rule pertinent to § 5/2-1007 is Rule 231, which materially pertains only to motions for trial date continuance in order to procure additional "material evidence," and which requires a showing of due diligence only in attempting to procure *that evidence*.

Mann responded to the objection by noting its irrelevance and by rattling off the extensive evidence – internal Upjohn memoranda, FDA documents, transcripts of testimony of Upjohn executives given in other Halcion cases, etc. – that she had obtained. Yet Judge Cox denied Mann's motion, enunciating a court policy requiring plaintiff movants to prove due diligence in prosecuting the lawsuit and measuring due diligence solely by the number of depositions taken by the plaintiff and by the plaintiff's designation of at least one paid opinion witness. It was a statement of court policy reiterated to her again and again, by one after another of the 2005 judges. Eventually it became clear – at a hearing on November 4, 1997, before Chief Judge O'Connell – that O'Connell himself had promulgated the policy.

It is this policy of defining due diligence in a manner divorced from the actual evidentiary needs in the particular

case and pegged instead purely to the plaintiff's out-of-pocket monetary expenditure that Mann challenges as violative of the Fourteenth Amendment's due process and equal protection clauses. Mann challenges as unconstitutional the mechanical prerequisites of these huge monetary expenditures, whether as a precondition to trial-date continuances or to trial itself. Mann paid approximately $22,000 to litigate that case, but it wasn't enough to meet the court's minimum-expenditure test.

These requirements correlate necessarily to monetary expenditure and not necessarily to anything else – which, as Mann discusses below, appears to be their very purpose. Certainly their effect is to concentrate plaintiff's medical-malpractice and pharmaceutical products-liability litigation in the hands of a handful of very wealthy and influential personal injury lawyers, who, as Mann showed at a hearing during a bizarre foray into federal district court on this issue in this case, can and do obtain trial-date continuances upon simple demand and who also play significant roles in the election and retention of these judges.

Mann filed a motion for reconsideration in which she scathingly challenged the policy as inconsistent with § 5/2-1007 and with the Fourteenth Amendment and with a provision of the Illinois state constitution that guarantees due process and equal protection of the law. She scheduled the motion for hearing on October 29, but several days earlier provided a courtesy copy of it to the 2005 chambers.

Judge O'Connell assigned himself to hear the motion-call that day. When the motion was called, he said he had arranged to have Judge Cox hear it in chambers. A few minutes later, when Mann and Upjohn counsel Marie Woodbury, a partner at Upjohn's national Halcion–litigation law firm based in Kansas City, Mo., arrived at chambers, two female County sheriff's deputies (who Mann learned later were supervisors who did not normally man courtrooms) flanked Mann. Judge Cox initially denied Mann's motion, on the reiterated grounds that Mann had not met the two due diligence prerequisites for a trial-date continuance. Mann then read aloud her two letters to *Wall Street Journal* reporter Laurie McGinley and held up a

bound copy of the FDA's Halcion Task Force report bearing the release date of May 29, 1996; she argued that her role in the release of the report a year after its completion surely demonstrated her due diligence – as, she said, did her compilation of voluminous other documents, including transcripts of depositions of FDA personnel and of Upjohn executives (past and then-current) taken in other Halcion litigation.

Mann also read aloud the entire *National Law Journal* Halcion-database article and detailed her conversations with attorney Ziotas. To Mann's astonishment, Ms. Woodbury contradicted the representations that Ziotas' had made in the *NLJ* article and to Mann that there was no protective order in *Scovish* barring his transmittal of copies of the database to Mann or to anyone else. Woodbury said she had attended the hearing at which the *Scovish* database motion was granted and that such a protective order was issued at the hearing. Judge Cox nonetheless reversed herself and granted Mann's motion, continuing the trial date to August 21, 1997. It was the only lengthy trial-date continuance Mann received, and it would have been sufficient had Judge Zwick not granted Upjohn summary judgment (temporarily, as explained below) on February 23, 1997.

Immediately after the October 29 hearing, Mann spoke with Ziotas, who said Woodbury had lied. Mann obtained a transcript of the *Scovish* hearing directly from the court reporter and forwarded a copy of it to Woodbury, who in a letter to Mann dated November 6, 1996, *acknowledged* that no such protective order was entered; she said Upjohn had filed a motion to have an earlier protective order that covered specific other documents made applicable to the database. Mann placed the *Scovish*-hearing transcript and a copy of Woodbury's letter into the court record, but apparently the appellate court didn't notice these when it romped *sua sponte* through the record on appeal looking for utter irrelevancies upon which to base its denial of appellate review of Mann's substantive bases for appeal.

As for the two supervisory sheriff's deputies, they mysteriously materialized at subsequent hearings in the case

before Judge Zwick, who at the key hearing, in January, 1997, on Upjohn's still-pending summary judgment motions ordered them to wait outside the conference room because their presence was upsetting Mann. After that hearing, Mann filed a formal complaint with the Sheriff's office, and these deputies never again appeared at a hearing in the case. Months later, though, another set of sheriff's deputies appeared at a key hearing, and followed Mann as she walked through the court building after the hearing (as had the first set of deputies, after the hearings at which they had appeared). Eventually, Mann learned that it was Chief Judge O'Connell who had ordered the presence of all these deputies at the various hearings.

As for the Halcion database, Upjohn's motion for protective order was denied. Upjohn dallied in producing until given a court ultimatum to do so. It then settled *Scovish* in order to avoid complying with the production order. Included in the settlement was a provision barring Ziotas from handling any other Halcion lawsuit and barring him or anyone from his office from speaking to Mann again. Ziotas' paralegal, with whom Mann had spoken on several occasions told Mann this, and told her that she was not supposed to tell her this or to speak with her at all.

So Mann sought the database on her own, in a months-long battle during which, in July, 1997, she accused Upjohn lead national Halcion trial counsel Stephen Scheve of feigning eye surgery in order to run out the trial-date clock before a ruling on Mann's production request, an allegation that the Appellate Court called inexcusable. Judge Zwick ultimately granted Mann's motion to compel the production of the database, and Upjohn produced the database to her on 69 computer disks. She was the only Halcion plaintiff to actually obtain the database. The appellate court, in refusing to consider her substantive grounds for appeal – including her challenges to the policy of equating due diligence with the number of depositions taken and the designation of a paid opinion witness – cited Mann's eye-surgery accusation as a ground for its refusal. Scheve had indignantly insisted that he indeed has had eye surgery, but he produced no tangible

evidence of it and, contrary to the appellate court's inference, there was no judicial determination of fact about it (mainly because it was just a passing incident, hardly a significant controversy). The appellate court did not explain why it thought Mann's allegation gave it a ground to refuse to consider the merits of her appeal.[1]

On February 25, 1997, Judge Zwick entered summary judgment in Upjohn's favor on the only two counts in the complaint against Upjohn.. Her stated grounds: Dr. Karesh at his 1995 deposition refused at the suggestion of his attorney to answer O'Malley's question concerning whether or not his recommendation for treatment of Mann would have been different had the Halcion package insert in 1987-89 been the same as it was at the time of his deposition. His attorney had objected to the question, saying, "Calls for speculation," so he answered, "Perhaps. I can't say." The judge said Mann thus could not prove "to a reasonable degree of medical certainty" that her use of Halcion – continuously for two years in dosages of .25 mg and .5 mg – would have been different had the warnings at the time she used the drug been the same as the warnings at the time of Karesh's deposition. The judge also ruled that Illinois's so-called learned intermediary doctrine eliminated Upjohn's duty to provide accurate and

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[1] By then, Scheve's credibility among Halcion litigants was strained. He had written a rather infamous letter in 1994 to attorney Michael Mosher threatening Mosher with a copyright-infringement lawsuit if he disseminated Halcion-related Upjohn internal documents Mosher obtained from the court file in an early Halcion case in Utah. Mosher had responded – accurately – that the federal court in that case had ruled the documents *unprotected* by copyright law. Mann filed copies of that correspondence as exhibits in her case. Mosher also had alleged in court papers he filed in 1994 in a Halcion case that Scheve, before producing key Halcion documents to Mosher, rearranged the pages of some of the documents so they were indecipherable. Mann filed a copy of that document as an exhibit, too.

adequate information about the drug to Dr. Karesh for disclosure to Mann so that Mann herself could make an informed decision about whether to use the drug.

Mann filed a motion for reconsideration. When that was denied, she filed a motion for leave to file amendments to the complaint adding several counts alleging fraud, negligence, strict liability and battery; this procedure is permitted under 735 ILCS § 5/2-1005(g). On April 22, 1997, Judge Zwick granted the motion, rendering the February 25, 1997, summary judgments interlocutory and not immediately appealable. It was Upjohn's turn to move for reconsideration, which it did, asserting an insufficiency of the evidence. The motion was argued in depth and ultimately denied, in a detailed memorandum opinion issued on June 5.

Immediately afterward, Upjohn resumed inundating Mann with new discovery demands, and it filed another summary judgment motion, this one arguing specifically that as part of her *prima facie* case Mann needed a paid physician to testify that the Halcion *had caused* her illnesses, and that her failure to designate such a witness entitled Upjohn to summary judgment. The trial was still scheduled to begin on August 21, so on July 1, Mann moved for a trial date continuance on the basis that she had lost the three and on-half crucial months when the case was effectively dismissed – time that under the circumstances was crucial. She also said she badly needed to retain counsel because she could not continue to respond to Upjohn's nearly daily discovery and motion demands; she said, accurately, that Upjohn was serving her with documents by Fed-Ex and by local messenger service at all hours of the day and late into the evening and that it was beginning to make her physically ill.

Upjohn's local counsel, well familiar with the O'Connell policy, responded citing Mann's "lack of due diligence" in failing to take depositions and to name a paid opinion witness. Mann's motion was denied, on those stated grounds, over Mann's protestations that she *did not need* more deposition testimony or a paid witness in order to prove her case.

Meanwhile, Mann responded to the summary judgment motion, in part by quoting Federal Rule of Evidence 702 and its Advisory Committee Notes and arguing that that Rule and its Notes concerning the use of expert witnesses actually reflect due process requirements – an argument she repeated on appeal and that she reiterates here. "What's left for the jury, then," Mann asked rhetorically, "if opinion testimony not that the drug *could have* caused the illnesses but that it *did cause* the illnesses is required before a plaintiff can get her case *to* a jury?" She noted that she already had Upjohn's admission in a variety of documents that the drug *could* cause those illnesses, and she had the extensive statistical evidence from the FDA and from Upjohn itself. Judge Zwick agreed, and in a memorandum order issued on July 31, 1997, *denied* the summary judgment motion.

Mann renewed her motion for trial-date continuance, eking out a series of short continuances enabling her to respond to Upjohn's latest (and unceasing) discovery demands but not allowing her the extension she needed – a minimum of three months – that would have enabled her to retain trial counsel. At a hearing in late October, when she noted to the judge – Judge Cox – that every trial-date-continuance motion presented thus far that morning was granted except hers, some on cases older than hers, the judge said outright that she and her colleagues were "not averse" to trial-date continuances but that Mann had not met the two due diligence prerequisites.

The next day, Mann filed the federal-court civil rights petition that she mentioned above. The district judge's comments at the one hearing in federal court, on October 30, which were sympathetic to Mann's position, persuaded Judge O'Connell on November 4 to continue the trial date, and he also assigned the case for trial to Judge Zwick, who scheduled the trial for a date in February. Mann arranged for trial counsel, but Zwick then advanced the pretrial schedule by several weeks, and so Mann's trial counsel reneged. That lawyer, who was based in Boca Raton, Fla., was litigating a major Halcion case in California, *Norgart v. The Upjohn Co.*, 21 Cal. 4th 383, 981 P. 2d 79 (1999). Mann flew to Florida to

meet with him, and had mentioned her plans to Scheve at a hearing the day before. When she arrived at that lawyer's office, he told her that Scheve, who also was lead Upjohn counsel also in *Norgart*, had phoned him that morning to try to dissuade him from representing Mann, telling him that Mann would sue him for malpractice. Mann related the incident at a hearing shortly afterward at which Scheve was present. He didn't dispute the account. A transcript of the hearing was in the record on appeal, as was a document Mann filed in which she described the incident. The appellate court must have missed these while foraging through the record.

Another law firm then asked Zwick to reschedule the trial date to enable that firm to represent Mann, but Zwick said she was given instructions "from on high" not to do so. In February, Zwick did reschedule the trial for April, but Mann was unable to retain trial counsel for it. In mid-March, she notified the judge and Upjohn's counsel that on the scheduled trial date she would request a dismissal for want of prosecution because she could not try the case *pro se*. She did that. Then, also as she had said she would, she quickly filed a motion to vacate the dismissal pursuant to 735 ILCS § 5/2-1301(e), which allows for this. The motion was denied.

Mann appealed from the summary judgments, from the repeated denials of her motions for a single trial-date continuance of sufficient length to enable her to retain trial counsel, and from the denial of her § 5/2-1301(e) motion. Upjohn cross-appealed from the denial of its sufficiency-of-evidence summary judgment motion.

During the appeal, Mann filed two judicial-refusal motions, both of which were *granted*. Mann filed both motions because the judge at issue was a former trial-court judge who was appointed by the Illinois Supreme Court at the recommendation of Judge O'Connell to fill a vacancy created on the appellate court by a mid-term retirement. (The second of the two, Judge Judith Cohen, had been a 2005 judge, and was the only current 2005 judge who had never ruled on any of Mann's trial-date-continuance motions, but she had attended the daily morning in-chambers conferences. She also

was the head of the Law Division at the time, appointed to that post by O'Connell. In a July, 1998, cover profile of her in the journal *The Chicago Lawyer*, Cohen said she owed her career to O'Connell, whose friendship with her dated to before she began law school.) Immediately after Cohen's recusal, the appeal was reassigned to another Division of that court, and assigned to the panel headed by Justice Anne Burke, husband of Chicago City Counsel Finance Committee Chair Edward Burke, the Democratic Party' longtime local judicial slate-maker. See *Chicago Sun-Times* article at App. F. Justice Burke wrote the appellate opinion, including its use of Mann's judicial-recusal motions as a ground for the denial of substantive appellate review. Her panel colleague Justice Warren Wolfson is featured in the article, too, at App. F 7.

One day before the issuance of the opinion, O'Connell publicly announced his retirement from the bench at age 58, in the middle of his term as chief judge and in the middle of his judicial term.

As Mann has stated above, that court refused to consider her appeals from the summary judgments, and refused to consider her statutory and constitutional challenges to the monetary-expenditure standard for determining trial-date continuance motions. It did consider her appeal from the denial of § 5/2-1301(e), but nothing else.

Invoking Illinois State Constitution, Art. VI, sec. 4(c), which reads, "Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court ...," and Illinois Supreme Court Rule 317, Mann filed an appeal with the Illinois Supreme Court concerning the appellate court's refusal to consider her appeals from any but the denial of her § 5/2-1301 motion.

She argued, as she does here, that the appellate court lacked the legal authority to refuse to review the propriety of the summary judgments and the denials of her motions for trial date continuance, and that it's doing so denied her due process and equal protection of the law. And, most

significantly, she argued, as she does here, that that court lacked the legal authority to *determine issues of fact* concerning procedural matters that were disputed in the trial court, effectively *reversing* a slew of trial-court findings concerning those disputed facts, and then in classic *non sequitur* fashion premising rulings concerning *unrelated issues* upon those reversed findings of fact; she argued that its doing so denied her due process of law. She argued, alternatively, that the appellate court lacked the legal authority to base *any* ruling whatsoever upon the fact that Mann had availed herself of the laws permitting judicial recusal motions and objections to discovery demands, the latter which is an exceedingly common practice in litigation and certainly one that has never been (nor logically or legally could be) grounds for a finding of waiver of substantive appellate review or anything else unrelated to the merits of the objections. She contends that these were *ultra vires* acts and as such denied her due process and equal protection of the law.

Jointly, she filed a petition for discretionary Supreme Court Review pursuant to Illinois Supreme Court Rule 315(a), asking the court to consider whether the trial court's stated policy of the mechanical *de facto* monetary-expenditure test for trial-date continuances, unrelated as it is to the actual *prima facie* evidentiary needs of the case, violates the Fourteenth Amendment's due process and equal protection clauses and Art. I, sec. 2, of the Illinois state constitution. She also asked the court to consider whether the stated policy of the trial court to mechanically require the testimony of a paid opinion witness on the ultimate issue of causation in the case violates the Seventh Amendment's provision of the right to trial by jury. And she asked it to consider the propriety under the Illinois constitution and the Fourteenth Amendment, Sec. 1, of the trial court's refusal to comply with the mandate of 735 ILCS § 5/2-1007.

That Court on December 5, 2001 rejected the appeal, and notified Mann in a letter that (the mandate of Art. VI, sec. 4(c) notwithstanding) read, "The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in

the above entitled cause." (App. B.) Mann filed a motion for reconsideration in which she argued, as she does here, that that court's noncompliance with state constitutional mandate itself was an *ultra vires* act and thus a denial of due process – that an enunciated right conferred by a state constitution or state statute creates a due process property interest in those to whom it pertains, a right that cannot be so casually abridged.

SUMMARY OF ARGUMENT

Mann's arguments are summarized in the three paragraphs immediately above. Here, in arguing that appeals courts simply lack the legal discretion to act beyond the legal authority prescribed to them by law, she cites *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); she posits that such *ultra vires* acts on the part of state appellate and Supreme courts violate the Fourteenth Amendment's due process clause. In arguing that the Fourteenth Amendment's equal protection clause requires state appellate courts to apply particular state law (in this instance, narrowly tailored, precise state statute and constitutional mandate) in all cases in which that law is applicable, she cites *Fiore v. White*, 121 U.S. 712 (2001), in support. And in arguing that the Illinois Constitution's Art. VI, sec. 4(c), confers a Fourteenth Amendment property interest in the consideration by the Illinois Supreme Court of the federal and state constitutional issues that arose for the first time in and as a result of the action of the Appellate Court, she cites *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972). She also notes the discussion in *Thielman v. Leean, et al.*, 282 F.3d 478 (7th Cir. 2002), concerning the source of due process rights: "Liberty interests can arise from two sources: the Federal Constitution or state law...."

She argues that the court's compliance with codified state law is not discretionary but mandatory, and that this is what is at the heart of the concept and the promise of the rule of law.

She also argues that appellate courts lack the legal authority to determine disputed issues of fact, including

disputed issues of *procedural fact regarding the conduct of the lawsuit* as the appellate court did wholesale in this case. Partly, this is because those courts simply lack the *apparatus* to serve as fact-finding courts. She references a discussion on this point in *Finer Foods, Inc. v. U.S.D.A.*, 274 F.3d 1137 (7th Cir. 2001). She argues that *absent a fact-finding procedure in compliance with due process*, any fact-finding by any court, whether a trial court or an appellate court, violates the most obvious and fundamental of due process guarantees.

She also argues that appellate courts lack the legal authority to deny appellate review upon whim (e.g., on flagrant *non sequiturs*) when, as here, that appellate review is mandated by the state constitution and is regularly accorded to appellants, and that the court's doing so violates the Fourteenth Amendment. In support she cites *Daniels v. Williams*, 474 U.S. 327 (1986); *Lindsey v. Normet*, 405 U.S. 56 (1972); and *Bounds v. Smith*, 430 U.S. 817 (1977). She argues that the Illinois Supreme Court's designation of her appeal as one not of right but as a *petition for appeal as a matter of right* is an oxymoron; legal rights, by definition, may be exercised without the need to petition to exercise them. Surely there is a line beyond which the cavalier disregard of codified state law violates the Fourteenth Amendment, and the court in this instance crossed it.

And she argues, most vigorously, that appellate courts lack the legal authority to deny appellate review to, or in fact to take *any sanction whatsoever* against, a party *for her having properly invoked codified procedural rules*, whether in the discovery process or otherwise. She argues that the due process and equal protection clauses prohibit such caprice. She also notes the absurdity of the appellate court's having cited her judicial-recusal motions as grounds upon which to deny her appellate review; she references *U.S. v. Microsoft* Corp., 253 F.3d 34 (D.C. Cir. 2001), and *Sao Paulo State v. American Tobacco Co*, Inc., 535 U. S. ___(2002), and notes that neither Microsoft nor American Tobacco was denied appellate review of their substantive claims because they had moved for judicial recusal.

And she argues, not least, that due process requires that any evidentiary prerequisite to trial, whatever form the prerequisite takes, be based upon the *prima facie* needs in the specific case – upon the sufficiency of the evidence obtained in *that case* – and not upon a blanket court policy concerning *the manner and cost of obtaining* the necessary evidence. She also argues that Federal Rule of Evidence 702 and its Advisory Committee Notes articulate not just a federal procedural rule but also due process truth. She also argues that the mechanical (and legally asinine) requirement that discovery be obtained through deposition testimony taken in that case rather than through other documentary means also violates due process, and that because of their monetary expense both these requirements irrationally deny equal protection as well. She notes the pivotal role that the massive volumes of internal corporate documents have played in the tobacco litigation of recent years, partially the documents made available on the Internet for free; reference *Baker v. General Motors Corp.*, 118 S. Ct. 657 (1998).

REASONS WHY THE WRIT SHOULD BE GRANTED

Mann has contended throughout the opinion-witness controversy in this case that it presents, in effect, the flip side to the issue this Court addressed in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). In *Daubert*, and later in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), this Court considered, albeit under a Federal Rule of Evidence 702 analysis rather than under a due process or equal protection or Seventh Amendment one, minimum qualifications for opinion testimony by an expert. She asks this Court to consider now whether a trial prerequisite of paid opinion testimony that is unnecessary to the prima facie case itself violates due process and equal protection guarantees and (in applicable cases) the Seventh Amendment's right jury determination. She asks this Court to determine whether, as she believes, the following comments in the Advisory Committee Notes to Federal Rule of Evidence 702 actually state an evidentiary due process rule:

> Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. . . . [O]pinions are not indispensable, [thus the Rule encourages] the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference.

State courts (certainly Illinois state courts) have, to a constitutionally inappropriate extent, delegated the civil justice process to highly paid opinion witnesses, mindlessly requiring these witnesses as a matter of course; see, e.g., *Mengelson v. Ingalls Health Ventures*, 323 Ill. App. 3d 69; 751 N.E.2d 91 (1st Dist., 2001). One result (as Mann notes in her Statement of the Case) is the consolidation of certain types of law practice in the hands of a small cadre of very wealthy lawyers. Another effect is that litigation in complex cases involving non-catastrophic injury is, without legitimate reason, becoming, for many, beyond monetary reach.

As for her request that this Court consider the other, larger, more complex Fourteenth Amendment thread of this petition: Mann has interwoven her arguments throughout – in her recitation in her Statement of the Case and (in more than summary fashion, she supposes) in her Summary of Argument. The specifics of her case concerning these due process and equal protection claims surely are unusual, but the free agency of state appellate and supreme courts, which is at the heart of those claims, apparently has become remarkably commonplace and remarkably casually accepted. Those courts, which can and do issue writs of mandamus and other legal orders to other government bodies, are themselves subject only to writs from this Court, and only a clarification by this Court that the state courts are subject to the parameters of their legally-prescribed authority will stem the tide of this free agency.

Respectfully submitted,
Beverly Mann

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER **AREA CODE 202**
CLERK OF THE COURT February 27, 2002 479-3011

Ms. Beverly B. Mann
7261 North Campbell Avenue
Chicago, Illinois 60645

Re: Beverly B. Mann
v. The Upjohn Company
Application No. 01A653

Dear Ms. Mann:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on February 27, 2002, extended the time to an including April 4, 2002

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Gail B. Johnson
Assistant Clerk

92383

App. B - 1

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING SPRINGFIELD,

Ms. Beverly B. Mann
7261 North Campbell Avenue
Chicago, IL 60645

ILLINOIS 62701
(217) 782-2035

December 5, 2001

No.92383 - Beverly B. Mann, petitioner, v.
The Upjohn Company, respondent.

Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 27, 2001.

2001 Ill. App. LEXIS 531, *

BEVERLY B. MANN, Plaintiff-Appellant and Cross-Appellee, v. THE UPJOHN COMPANY, Defendant-Appellee and Cross-Appellant.

No. 1-98-2343

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

2001 Ill. App. LEXIS 531

June 29, 2001, Decided

SUBSEQUENT HISTORY: [*1] Rehearing Denied August 14, 2001. Released for
Publication August 28, 2001.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County. Honorable Susan Zwick, Jacqueline Cox, Robert Bastone, Lynn Egan, Donald O'Connell, Judges Presiding.

DISPOSITION: Affirmed.

COUNSEL: FOR APPELLANT, Beverly B. Mann, Pro se, Chicago, IL.

FOR APPELLEE, Johnson & Bell, Ltd. (William V. Johnson, Thomas H. Fegan, of counsel, Chicago, IL, Shook, Hardy, & Bacon, L.L.P. (Stephen E. Scheve, Marie S. Woodbury, Thomas A. Sheehan, of counsel), Kansas City, MO.

JUDGES: JUSTICE BURKE delivered the opinion of the court. HALL, P.J., and WOLFSON, J., concur.

OPINIONBY: BURKE

OPINION: JUSTICE BURKE delivered the opinion of the court:

Plaintiff Beverly Mann appeals from numerous orders of the circuit court granting summary judgment to defendant The Upjohn Company on counts I and II of plaintiff's complaint, granting summary judgment to defendant on count IV of plaintiff's amendments to her complaint, granting defendant's motion to dismiss count VII of plaintiff's amendments to her complaint,

denying plaintiff's motion to amend her complaint, denying plaintiff's motions for continuance of the trial date, and denying plaintiff's motion [*2] to vacate the dismissal of her complaint for want of prosecution (DWP) Defendant cross-appeals from orders of the circuit court granting plaintiff's motion to amend her complaint following summary judgment on counts I and II, denying defendant's motion for summary judgment based on lack of expert testimony on causation, and denying defendant's motion for summary judgment on plaintiff's economic loss claims. For the reasons set forth below, we affirm.

STATEMENT OF FACTS

Plaintiff, an attorney, filed a pro se complaint against defendant alleging that she suffered physical and psychological injuries as a result of her ingestion of a prescription drug, Halcion, from January 1988 to January 1990. Halcion, also known as triazolam, is a member of the benzodiazepine drug class and is a sleep aid used to treat insomnia. Defendant manufactures Halcion and the drug received the Food and Drug Administration's (FDA) approval and licensing in 1982. Numerous complaints similar to plaintiff's were filed against defendant across the country following various news magazine and newspaper articles, as well as a "20/20 Report" detailing adverse side effects of Halcion.

Plaintiff's complaint against [*3] defendant was based on claims of negligence (count I) and products liability (count II), and alleged that defendant failed to adequately warn her of the detrimental effects of Halcion. Plaintiff's complaint was subsequently removed to the federal district court based on diversity jurisdiction. Plaintiff was ordered two times by the district court to answer outstanding discovery and to sign medical authorizations. In August 1992, plaintiff voluntarily dismissed her federal complaint, but plaintiff was granted leave to refile it in state court. In October 1992, plaintiff retained an attorney who refiled plaintiff's complaint in the circuit court of Cook County. In addition to the claims against defendant, plaintiff added as defendants Dr. John Karesh, the doctor who prescribed Halcion for her, and NorthCare Medical Group, where Karesh worked, alleging medical malpractice (count III). In February 1996, the court granted summary judgment in favor of Karesh and NorthCare based on its determination that the claims against them were time barred by the applicable statute of limitations, and they are not parties to this appeal.

In early 1993, the trial court ordered plaintiff to answer interrogatories [*4] on two occasions. In November 1993, defendant filed a motion for sanctions based on plaintiff's failure to comply with discovery. Although the trial court denied the motion for sanctions, the court ordered plaintiff to answer discovery. In the summer or autumn of 1994, defendant filed a motion to compel answers to interrogatories. The trial court's ruling on this motion is not contained in the record.

In May 1996, defendant filed three motions for summary judgment with respect to counts I and II of plaintiff's complaint; one based on lack of evidence of causation, one based on lack of evidence of loss of income claim, and one based on adequacy of warnings. On June 18, plaintiff's attorney was granted leave to withdraw as plaintiff's counsel. During the summer of 1996, defendant filed a motion for relief from plaintiff's personal attacks on counsel. Neither the motion itself, nor the trial court's decision, is in the record.

Plaintiff filed her first motion for a continuance of the trial date on October 22 in order to retain new counsel and to obtain defendant's Halcion database. Plaintiff was ordered on this date to answer Supreme Court Rule 213 interrogatories. 177 Ill. 2d R. 213. [*5] Thereafter, the trial court denied plaintiff's motion for continuance. At the hearing on this motion, the court questioned plaintiff about her discovery efforts and expressed its concern with respect to her diligence in prosecuting the case. The court stated that it had serious problems with whether plaintiff had done discovery and advised plaintiff that this was her "last chance." At this hearing, plaintiff accused defense counsel of being notorious for harassing plaintiffs. Plaintiff filed a motion to reconsider, which the trial court granted. The trial was continued from December 9, 1996, to August 21, 1997. Plaintiff was also ordered to answer Rule 213(g) interrogatories by January 3, 1997.

In December 1996, plaintiff replied to defendant's motions for summary judgment, relying on various documentary evidence. In January 1997, defendant filed a motion to bar plaintiff from presenting expert testimony based on her failure to comply with the court's order requiring her to answer Rule 213(g) interrogatories. On February 25, the trial court granted defendant's motion for summary judgment on counts I and II, and on March 25, it denied plaintiff's motion to reconsider its February 25 [*6] order granting summary judgment.

On April 22, the trial court granted plaintiff's motion to amend her complaint, allowing her to add claims for fraud (count IV), negligence (count V), products liability (count VI), and battery (count VII) based on alleged misrepresentations made by defendant. Defendant's subsequent motion to reconsider the order allowing plaintiff to amend her complaint was denied. Defendant thereafter filed a motion to dismiss plaintiff's amendments to her complaint.

On June 18, the trial court granted defendant's motion to require plaintiff to submit to an independent medical examination (IME). This motion had apparently been pending for over a year. On June 20, plaintiff filed a motion to continue the trial date, contending that the case had been in suspension from February 25 (when summary judgment was granted on counts I and II of her complaint) until April 22 (when she was allowed to amend her complaint). In June, plaintiff filed a motion to compel

production of the Halcion database, which the trial court subsequently granted on September 23. On July 1, plaintiff filed a motion to continue the trial date to retain counsel, which the trial court denied based [*7] on its determination that plaintiff had not been diligent in prosecuting her case and had not demonstrated good cause for a continuance. At the hearing, the court expressed to plaintiff its concern with her discovery efforts over the previous five years. Rather than answer the court's questions with respect to what discovery remained, plaintiff engaged in an outburst and verbally attacked defendant. The court admonished plaintiff that it would not tolerate such conduct. Because of plaintiff's outburst, the court continued the matter to later that day. When the hearing resumed, the court indicated to plaintiff that her case was in jeopardy and that she had not answered Rule 213 interrogatories even though she had been ordered to do so. It then denied plaintiff's motion to continue.

Sometime during the summer of 1997, the FDA commissioned the National Academy of Sciences' Institute of Medicine (IOM) to conduct an independent review of Halcion. On July 9, the trial court granted defendant's motion to dismiss plaintiff's battery claim, but denied its motion to dismiss the negligence, fraud, and products liability claims. On July 10, the trial court granted plaintiff's motion to reconsider [*8] its order of June 18, requiring plaintiff to submit to an IME. However, on July 22, the trial court again granted defendant's motion for an IME. Plaintiff's motion to reconsider was denied and she underwent psychiatric and psychological examinations in August 1997. Thereafter, in an emergency motion for an extension of time to file a brief on her motion to compel production, plaintiff accused one of defendant's counsel of faking surgery for the purpose of delay.

On July 23, the trial court continued the trial date from August 21 to October 21, 1997, although the court did question plaintiff as to what discovery she had done and admonished her to answer the court's questions and cease being unresponsive. The court further indicated that plaintiff was in the position she was in with respect to discovery of defendant's documents due to her "own doings," e.g., her failure to review the documents when they were produced in 1992. The court struck those portions of plaintiff's motion for an extension of time that dealt with attacks upon defense counsel. During the hearing, plaintiff also accused defense counsel of lying to the court both at this hearing and on previous occasions and [*9] demanded a transcript of the hearing so she could respond in writing.

On September 13, the trial court entered an order barring plaintiff from presenting any opinion witnesses except those previously disclosed and deposed, e.g., plaintiff's treating physicians. On September 18, plaintiff filed a motion to continue the trial date based on her need to obtain the IOM report as well as defendant's 8,500 patient study of Halcion. On September 23, plaintiff filed another motion to continue the trial date

based on the soon-to-be-released IOM report. At a hearing on this date, plaintiff accused defense counsel of lying to the court. The court warned plaintiff that it would censure her and told her there were to be no more attacks in her written memorandum on "how bad" defendant and defense counsel were. Plaintiff was further instructed that she was to cease her accusations that defense counsel was lying. The court advised plaintiff that it would strike her briefs in their entirety if she continued her conduct. On September 29, plaintiff amended her motion to continue. However, the motion was withdrawn based on plaintiff's pending motion to recuse Judge Cox for cause.

On October 3, plaintiff [*10] filed an amended motion to continue the trial date based on the forthcoming IOM report. Plaintiff supplemented this motion on October 7, alleging a history of unethical conduct on the part of defendant's attorney, including fabrication of data for defendant. The trial court granted plaintiff's motion to continue based on the recent disclosure by defendant of the IME reports and continued the trial from October 21 to November 4. On October 17, the trial court denied plaintiff's "Motion for Substitution of Judge." On October 24, plaintiff filed an emergency motion to continue the trial date based on the imminent release of the IOM, which the trial court denied. At this hearing, plaintiff again accused defense counsel of making false statements to the court. Plaintiff was admonished about this as well as the fact that what occurred in other Halcion cases in Cook County and the fact that continuances were granted in other cases, as plaintiff argued, were irrelevant because each case was to be considered individually. The trial court also denied plaintiff's subsequent October 27 motion to continue the trial. On October 30, plaintiff advised defendant that she would not proceed to trial [*11] on November 4 and would allow the court to DWP her case.

On November 4, plaintiff renewed her motion to continue the trial date, which the court granted; however, the court noted that plaintiff had done little affirmatively to work up her case, in particular, to disclose witnesses to prove up liability. The court also transferred the case to Judge Zwick for all further proceedings. On November 13, the IOM report was released. On November 20, a status hearing was held at which time trial was set for February 23, 1998, and discovery was cut off as of December 23, 1997. At this hearing, plaintiff again accused defense counsel of making misrepresentations to the court and distorting the truth. Plaintiff demanded that she be allowed to respond in writing. On November 21, plaintiff was allowed to amend her complaint to add punitive damages claims.

Sometime in December, defendant filed a motion for summary judgment on plaintiff's fraud claim, apparently on the basis of preemption by federal law. Defendant also filed a motion for sanctions against plaintiff based on its contention that she violated a protective order entered in the case

by sending defendant's Halcion database to an attorney [*12] in Texas. On December 27, defendant filed a motion to dismiss plaintiff's amendments to her complaint. On December 31, defendant filed a motion to bar plaintiff's fact witnesses because they were identified after the discovery cut off date, their testimony was not disclosed by plaintiff, or they were opinion witnesses.

In December 1997 or January 1998, plaintiff had apparently arranged for two different attorneys to act as her counsel. However, both counsel later declined to represent plaintiff based on time constraints and the state of the record.

On January 9, 1998, defendant filed another motion for summary judgment on the fraud count, alleging that plaintiff had no evidence to establish reliance by the FDA on any alleged misrepresentations by defendant. On the same day, the trial court denied plaintiff's motion to amend her complaint, concluding that her proposed claims were based on failure to warn, a claim upon which defendant had been previously granted summary judgment.

On January 28, defendant filed a motion to have facts deemed admitted based on plaintiff's failure to answer defendant's request for admissions. On February 13, plaintiff filed an emergency motion to designate [*13] an opinion witness on causation, which plaintiff was later allowed to withdraw. On February 19, the trial court granted defendant's motion to bar fact witnesses. On February 23, the trial court continued the trial date to April 23. On March 3, the trial court denied defendant's motion to dismiss counts IV and V of plaintiff's complaint, but granted defendant's motion for a bill of particulars as to count IV. On March 6, plaintiff moved to supplement her response to one of defendant's motions for summary judgment with the November 13, 1997, IOM report. This request was denied on March 17. On March 27, the trial court granted defendant's motion for summary judgment on plaintiff's fraud count. Plaintiff filed an emergency motion to reconsider the grant of summary judgment to which she attached various documents. The trial court denied plaintiff's motion to reconsider.

On April 21, plaintiff filed an emergency motion to continue the trial date to retain counsel, which the trial court denied. At this hearing, plaintiff accused defense counsel of engaging in tactics to keep her from obtaining the assistance of counsel that she needed, i.e., that defense counsel had persuaded an attorney [*14] who had agreed to represent plaintiff from representing her. Plaintiff also accused defense counsel of making substantial misrepresentations to the court. The trial court admonished plaintiff, warning her to stop her repeated interruptions of the proceedings and interruptions when others were talking, and to stop with her outbursts. Plaintiff renewed her motion to continue on April 23, which the trial court again denied. The following colloquy then occurred:

"MS. MANN: *** I am not prepared to proceed to trial. So I would assume that that means you will enter a dismissal for want of prosecution.

THE COURT: I guess I should make this more formal because I assumed something that was not true. For the record, is the defendant ready to proceed to trial?

MS. WOODBURY [defense counsel]: Yes, your Honor.

MS. SCHEVE [defense counsel] Yes, your Honor.

THE COURT: For the record, is the plaintiff prepared to proceed to trial?

MS. MANN: No, I am not.

THE COURT: Will you be prepared to proceed to trial any time this afternoon?

MS. MANN: No.

THE COURT: This court then has no other recourse then if the plaintiff is [un]prepared and unwilling to proceed at trial to dismiss the case. [*15]

***

The case is dismissed for want of prosecution."

Thereafter, the trial court granted defendant's motion for costs. Plaintiff then filed a handwritten motion to vacate the DWP, which the trial court denied, stating it would not vacate an order it had entered just five minutes previously. On May 8, plaintiff filed a motion to vacate the DWP pursuant to section 2–1301 of the Code of Civil Procedure (735 ILCS 5/2–1301 (West 1998)) and an emergency motion to withdraw the motion to vacate the DWP she had earlier filed. On May 22, plaintiff amended her motion to vacate and, on May 26, she filed a second amended motion to vacate as well as a motion to reconsider the trial court's order denying her motion to continue the trial date. On June 8, the trial court denied plaintiff's motion to vacate the DWP. The next day plaintiff filed a motion to reconsider the June 8 order and, on June 16, she filed an amended motion to reconsider. On June 17, plaintiff filed a corrected amended motion to reconsider, which was denied on June 18. On June 19, plaintiff filed a second amended motion to reconsider the order denying her motion to vacate the DWP and, sometime [*16] thereafter, she filed a third amended motion. On June 26, the trial court declined to hear plaintiff's third amended motion to reconsider. Plaintiff filed a notice of appeal on July 1, which she amended on July 7. On July 7, plaintiff

again requested that the court hear argument on her third amended motion to reconsider, and the trial court again declined to conduct a hearing on it. On July 14, defendant filed its cross-appeal.

ANALYSIS

Generally, dismissal of a case for want of prosecution is not a final order which can be appealed since a plaintiff has an absolute right to refile the case within one year of the dismissal. Wilson v. Evanston Hospital, 257 Ill. App. 3d 837, 839, 629 N.E.2d 589, 196 Ill. Dec. 44 (1994). Pursuant to section 12--317 of the Code of Civil Procedure (735 ILCS 5/12--317 (West 1998)), where a plaintiff's action is dismissed for want of prosecution, the plaintiff has the option "to refile the action within one year of the entry of the DWP order or within the remaining period of limitation, whichever is greater." S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander, 181 Ill. 2d 489, 497, 693 N.E.2d 338, 230 Ill. Dec. 209 (1998). A "trial [*17] court's order denying the vacature of [a] DWP must also be nonfinal and nonappealable since there is an absolute right to refile following that order." Wilson, 257 Ill. App. 3d at 840. Similarly, a timely motion to reconsider the denial of a motion to vacate does not transform the DWP into a final and appealable order--this is simply a reaffirmation by the trial court of its earlier decision which in no way affects finality of the DWP. Wilson, 257 Ill. App. 3d at 840. Only after the one-year period for refiling has expired does a DWP become final and appealable. Vaughan, 181 Ill. 2d at 502. Plaintiffs, however, are only entitled to one refiling of a cause of action under section 13--217 following a voluntary dismissal. Timberlake v. Illini Hospital, 175 Ill. 2d 159, 164, 676 N.E.2d 634, 221 Ill. Dec. 831 (1997).

In the instant case, the general rule with respect to the nonfinality of DWPs is not applicable because after the trial court dismissed plaintiff's case for want of prosecution, plaintiff had no right to refile her cause of action since she had already had her one refiling under section 13--217 when she refiled her complaint [*18] in the circuit court in October 1992 following her voluntary dismissal of her complaint in the federal court. See Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 105, 672 N.E.2d 1207, 220 Ill. Dec. 195 (1996). Accordingly, when the trial court dismissed plaintiff's entire complaint for want of prosecution on April 23, 1998, at plaintiff's voluntary request, and denied her motion to vacate the DWP on June 8, 1998, the dismissal was with prejudice and rendered the DWP order final. See Danaher v. Knightsbridge Co., 56 Ill. App. 3d 977, 980, 372 N.E.2d 862, 14 Ill. Dec. 583 (1978) (order denying motion to vacate is final and appealable). In addition, because the rights of the parties were ascertained and absolutely fixed at the time the trial court denied the motion to vacate on June 8, the prior court orders granting summary judgment, dismissing count IV of plaintiff's complaint, and denying plaintiff's various requests for continuances, all of which were nonfinal orders that did not contain Rule 304(a) language, then

became final orders. It was on June 8 that the litigation was terminated upon the denial of plaintiff's motion to vacate. Thus, all prior orders were subject to [*19] appeal and plaintiff's notice of appeal filed on July 1, 1998, was timely.

Because plaintiff's entire cause of action was dismissed for want of prosecution, the sole issue before this court is whether the trial court properly exercised its discretion in denying plaintiff's motion to vacate the dismissal of her complaint for want of prosecution. If the trial court did not abuse its discretion in denying the motion to vacate, the remaining issues raised by plaintiff are rendered moot since the DWP order disposed of the entire cause of action.

Plaintiff contends that the trial court abused its discretion in denying her motions to vacate the DWP order by failing to consider the requisite criteria pursuant to section 2--1301 of the Code of Civil Procedure. According to plaintiff, a review of the transcripts of proceedings demonstrate that the trial court failed to analyze or state findings upon the required criteria for vacating an order. It is her contention that the overriding criteria is whether substantial justice was done and that section 2--1301, unlike section 2--1401 of the Code of Civil Procedure (735 ILCS 5/2--1401 (West 1998)), forbids consideration [*20] of due diligence. Plaintiff claims that the only thing she could do was let the trial court dismiss her case because she could not have proceeded to trial pro se. She contends that she prosecuted her case to the fullest extent of her abilities.

Pursuant to section 2--1301 of the Code of Civil Procedure, "the court may *** on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2--1301 (West 1998). The plaintiff, as the moving party, has the burden of establishing sufficient grounds for vacating the judgment. In re Marriage of Ward, 282 Ill. App. 3d 423, 432, 668 N.E.2d 149, 217 Ill. Dec. 964 (1996) "The primary concern in ruling on a motion to vacate is whether substantial justice is being done between the litigants and whether it is reasonable under the circumstances to proceed to trial on the merits." Marren Builders, Inc. v. Lampert, 307 Ill. App. 3d 937, 941, 719 N.E.2d 117, 241 Ill. Dec. 256 (1999). However, the court may also consider whether a meritorious defense exists, due diligence, the severity of the penalty as a result of the judgment, and the [*21] hardship to the nonmovant if required to proceed to trial. Marren Builders, 307 Ill. App. 3d at 941-42. The trial court should consider all events leading up to the judgment. Marren Builders, 307 Ill. App. 3d at 943. "'What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.'" Merchants Bank v. Roberts, 292 Ill. App. 3d 925, 932, 686 N.E.2d 1202, 227 Ill. Dec. 46 (1997), quoting Widucus v. Southwestern Electric Cooperative, Inc., 26 Ill. App. 2d 102, 108, 167 N.E.2d 799 (1960). The guiding

principle is to prevent dismissal when it would be unfair, unjust, and inequitable. Kirk v. Michael Reese Hospital and Medical Center, 275 Ill. App. 3d 170, 173, 655 N.E.2d 933, 211 Ill. Dec. 550 (1995).

"The decision to grant or deny a motion to vacate *** lies within the sound discretion of the trial court, and we will reverse only if the trial court abused its discretion." Marren Builders, 307 Ill. App. 3d at 941. A trial court abuses its discretion "when it acts arbitrarily without the employment of conscientious judgment or if its [*22] decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted." Marren Builders, 307 Ill. App. 3d at 941. "If reasonable persons could differ as to the propriety of the trial court's actions, then the trial court cannot be said to have exceeded its discretion." Merchants Bank, 292 Ill. App. 3d at 930.

In the instant case, we find that while dismissal is a severe penalty, under the circumstances of this case, existing from the beginning of the litigation, dismissal was a fair and just result, which did not deny plaintiff substantial justice. The record clearly reflects a lack of due diligence on the part of plaintiff, a complete refusal to follow established litigation procedures, and that plaintiff was certainly on notice as early as 1996 that her case was in jeopardy. From very early on, plaintiff refused to cooperate with discovery. She refused to answer interrogatories and requests for production of documents, she refused to sign medical authorizations although ordered to do so at least twice by the federal district court, and she refused to provide her medical information and records to defendant [*23] even though such information was crucial to the issues in the case. Defendant was forced to bring several motions to compel as well as motions for sanctions against plaintiff based on her refusal to cooperate with discovery. In fact, plaintiff was ultimately barred from presenting any opinion witnesses except for her own treating physicians because of her refusal to answer Rule 213 interrogatories.

Plaintiff's refusal to follow established procedures for presenting, preparing, and trying her case also supports the trial court's decision. Plaintiff advised the court several times that it was her intent to have the case litigated in a manner that was different than most products liability cases were litigated. Plaintiff repeatedly refused to answer the trial court's questions during oral arguments. Plaintiff ignored the court's comments from early on that it was concerned with what efforts she was taking to move the case forward and that her position was in jeopardy. As early as October 1996, the trial court questioned plaintiff's diligence and discovery efforts. Such questioning was continued throughout the case by the various judges hearing plaintiff's motions when they expressed [*24] their concerns with her discovery efforts and manner of prosecution of her case. The judges' comments at the various hearings clearly made their concerns known to plaintiff with respect to the adequacy of her

evidence and discovery efforts. Additionally, although the trial court attempted to apprise plaintiff of the procedures she needed to follow, plaintiff did not follow its suggestions and continued to argue to the trial court that she intended to try this case differently than other cases.

The numerous continuances and delays occasioned by plaintiff's conduct provide additional support for the trial court's decision. Although several of plaintiff's motions for continuances were based on her request to obtain counsel, we note that plaintiff herself chose to proceed pro se to protect her own interests and privacy. While we are not saying that plaintiff was not entitled to have counsel represent her, she voluntarily made the decision to initially proceed pro se and the case should not be further delayed in light of her insistence that she proceed pro se. See Clewell v. The Upjohn Co., 1995 U.S. Dist. LEXIS 17988, No. 94-2383 (E.D. Pa. November 21, 1995).

Lastly, we find plaintiff's repeated [*25] attacks upon defendant's counsel, both during oral argument and in her written documents before the trial court, very disturbing. Plaintiff was advised by the trial court that her conduct was improper and she was admonished on numerous occasions to cease her conduct. Plaintiff ignored the court's admonishments and continued her attacks upon defense counsel. We also admonish plaintiff that such conduct was improper, as well as inexcusable.

In summary, the record in this case discloses a lack of cooperation by the plaintiff in obeying court orders, indifference to the trial court's advice and admonishments, repeated attempts to delay the proceedings, and a failure to follow the rules of proper procedure. Plaintiff was the architect of her own predicament, and her complaint now that she was denied substantial justice will not be heard by this court. Francone v. Weigel Broadcasting Co., Inc., 79 Ill. App. 3d 991, 993, 398 N.E.2d 1114, 35 Ill. Dec. 164 (1979). The trial court indulged plaintiff and gave her many opportunities to proceed with her case, yet plaintiff did not avail herself of the court's indulgence. This case has lingered in the circuit court for six years and, after all the [*26] delays, refusals, and lack of cooperation by plaintiff, it would not be reasonable to force defendant to proceed to trial. The trial court's decision to deny plaintiff's motion to vacate its DWP order was reasonably made to prevent further delays and expenses and to reach an end to this litigation. We conclude that substantial justice was done and that the trial court did not abuse its discretion in denying plaintiff's motion to vacate the DWP order. Because the trial court did not abuse its discretion and because all claims were dismissed by the court's DWP order, the remaining issues raised in this appeal are moot, as are those raised in defendant's cross-appeal.

CONCLUSION

For the reasons stated, we affirm the judgment of the circuit court of Cook County.

Affirmed.

HALL, P.J., and WOLFSON, J., concur.

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May 20, 1996

Laurie McGinley
Wall Street Journal
Washington Bureau
1025 Connecticut Avenue N.W.
Washington, D.C. 20036

Re: FDA/ Justice Dept. Investigation of The Upjohn Company regarding Halcion.

Dear Ms. McGinley:

In follow-up, enclosed are copies of all the news reports I have concerning the FDA/Justice Dept. investigation of Upjohn.

Preceding the copies of the news reports is a note I faxed to my lawyers last fall summarizing my conversation with the person I spoke with at the FDA about the investigation.

The key person at the FDA is Mary Richardson. Her title is, or was, Deputy Division Director of the Division of Scientific Research.

Very truly yours,

Beverly Mann
(312) 465-4587

May 31, 1996

Laurie McGinley
Wall Street Journal
Washington Bureau
1025 Connecticut Avenue N.W.
Washington, D.C. 20036

Dear Ms. McGinley:

I want to express my appreciation to you for your decision to pursue the Halcion/Upjohn/FDA report. I recall telling you in our first conversation that the report never would be released if the media didn't pursue it. I'm sure I was right.

I know that the timing of the release of the report, on Friday, means that the initial story won't be published in the WSJ; by Monday, it will be old news. I'm sorry they orchestrated it that way.

But you might want to write a story about why the report was withheld for so long after it was completed and why it was necessary for the Congressional oversight committee and Congressman Barton to finally issue an ultimatum with a deadline in order to wrestle the report free. Even once the FDA knew the game was over, it withheld the report until the last possible moment, the deadline date.

You might also want to investigate whether the report released today is the original version or a watered-down one.

What stake do top FDA officials have in protecting this drug and this company?

Very truly yours,
Beverly Mann

Chicago Sun-Times
access #: 2088323
Date: 11/25/01
Slug: judg25
Section: News
Page: 14
Headline:Judgment day // So, you want to be a Cook County judge? You may think your experience and sound legal mind will win over the Democratic bosses when they gather to fill their judicial slate. Think again.
Unless you've paid your political dues, you stand little chance of gaining The bench. A winner, the slatemakers like to say, "is one of us."
Byline: Abdon M. Pallasch
Column: ANALYSIS
Subject: COUNTY GOVERNMENT; LEGAL; ELECTIONS
ArtA:

County Commissioner Cai Sutker (left) and Ald. Edward Burke (14th) discuss the slating of judicial candidates after the meeting of Democratic ward committeemen last week at the Hotel Allegro. Burke is ringmaster at the slatemaking session, held every two years.Democratic Committeeman John Daley (11th), the mayor's brother, said of one favored candidate: "He's the only individual who talked about 85 percent turnout, and the 3 o'clock call, which is very important to the election." The slatemakers revel in machine partisanship. State Democratic Chairman Michael Madigan makes a point during the slatemaking session.

Keys: Cook County;
Democrats; judicial slate

Somewhere in the dreams of good-government types lies a Shangri-La where the best and brightest legal minds appear before a panel of experts, present their resumes and get picked

to run for judge simply because they're right for the job--no matter who their dad might be.

But here at the Hotel Allegro, still called the Bismarck by the 50 Chicago Democratic ward committeemen who have gathered in a meeting room one day last week, legal experience is just an hors d'oeuvre. When the party bosses pick people to run for judge, they have deeper concerns.

Ken Cortesi walks up to the podium. He opens with talk about his work as an attorney for the City of Chicago, the State of Illinois, the CTA, and the good ratings he gets from Chicago's bar groups. Then he serves up the main course Chicago's ward bosses have been waiting for: "Most importantly, I've been a member of the 31st Ward Democratic organization since 1971," he says to nodding pols beside him on the dais, to the pols sitting in the stacking chairs, and to the pols standing in back near the sweet rolls.

"Like you, I've been a precinct worker. I delivered for candidates every time we had an election. I never failed to carry a precinct. I know what it is to work a precinct. I know what it is to get up early in the morning."

Yes! We have a winner.

Ald. Edward Burke (14th), the ringmaster at this judicial beauty pageant held every two years just before Thanksgiving, is delighted. "I frankly think that coming to the bench with legal skills is wonderful," he tells his fellow committeemen, "but coming to the bench with the kind of skills that you and I have ... people really need a sense of justice. Knowing what people out there in the neighborhoods have to go through is something that is equally important."

Simply put, Burke explains, Cortesi "is one of us."

Committeeman John Daley (11th), the mayor's brother, chimes in: "He's the only individual who talked about 85 percent turnout, and the 3 o'clock call, which is very important to the election." The committeemen laugh and cheer.

Let good-government types elsewhere in the nation agitate for appointed "merit selection" systems to take the politics out of choosing judges. In Cook County, the party bosses say, any system good enough to choose a president or a governor is good enough to choose a judge.

The committeeman and the aldermen make no apologies for their love of machine partisanship. They revel in it.

Burke jokes about the faithful Democrat who inserts a clause in her will demanding to be buried within the city of Chicago so she can remain active in the party no matter what happens. Ald. William Beavers (7th) praises one candidate whose uncle helped Beavers prepare for an appearance before a grand jury. Everybody in the room hoots. But Beavers declines to elaborate. Burke introduces his former neighbor, county prosecutor Laura Sullivan (Burke's neighbors tend to do well here--another former neighbor was slated for judge at the last slating session), who remembers when Burke's old ward office used to be at 4713 S. Halsted, back when Burke's dad was alderman.

"If the building were still up, I would petition the Vatican for designation as a shrine--my father used to work miracles there," Burke says as committeemen roar. "A guy would go down to 54 W. Hubbard and take the test for the Police Department, and he'd be too short. And he'd come to see my father at 4713 S. Halsted. My father would write out a little card, and he'd send him back there and--believe it or not--he'd grow an inch."

The crowd goes up for grabs.

"Someone would have a heart murmur, he'd write out a card and send 'em back to 54 W. Hubbard, and suddenly they were cured," Burke continued. "He made fat people thin. He made short people tall. It was marvelous."

Sullivan won't get slated, but she's well-positioned for next time.

One after another, the candidates come before the committeemen. The smart ones have done their homework, spending the last few years volunteering at their local ward office one night a week, meeting with as many committeemen as they could ahead of time, and keeping their speeches brief.

For all intents and purposes, this meeting is pointless—little more than a show. Pretty much everything has been decided. The key committeemen who control the wards with the highest Democratic voter turnout have already laid claim to each of the eight Circuit Court and three appellate seats that will appear on the ballot in March. But there may be a few seats in play right up until the last minute, so it doesn't hurt to make a pitch.

Michael Murphy, presiding judge of the Circuit Court's County Division, has the resume to merit consideration for the appellate court. But he has the political smarts to recognize that the committeemen have already settled on former Attorney General Neil Hartigan for the appellate court, filling the unofficial Irish quota for that office. Accordingly, he gives the shortest speech of the day: "I understand there are a lot of qualified people--if something happens, I'm always here," he says, throwing up his hands and smiling. Committeeman Tom Hynes (19th) glows. "That," he says, "was a brilliant presentation."

A rule of the game: If you are not slated, do not run against the slated candidate unless the ward bosses ask you to run because your ethnicity or gender will help siphon votes from the slated candidate's rivals. "In the event I am not slated, I would not run against the party," says Kerry Kennedy, an assistant public defender active with Ald. William Banks' (36th) ward organization.

"Good move," one committeeman's aide says quietly, nodding approval. Kennedy will be slated.

Another rule of the game: Allies can be enlisted to lobby the committeemen.

Standing up to back Mary Ann Mason's candidacy, Committeewoman P.J. Cullerton (38th) says she knew Mason was serious about running when "the priest that married me sent me a letter on her behalf."

Smiling at the podium next to Burke, Mason concedes: "Desperate times call for desperate measures."

One might think this is no way to pick a decent judge--and a number of judicial scandals over the years would seem to back that up. But perhaps more amazing than the 20 or so crooked Cook County judges who have been dispatched to prison in the last 20 years are the hundreds of highly regarded and honest judges who were elected through this same political process.

Chicago's best and brightest lawyers who want to be judges know the route there.

"I firmly believe, my family believes, that the Democratic Party stands for the working men and women, the poor, the disadvantaged," says James C. Murray Jr., a former partner at

Chicago's prestigious law firm of Katten, Muchin, Zavis. Murray boasts impressive family credentials. His father was an alderman and an appellate court justice.

Being active in the Democratic Party can make one a better judge, says Cortesi, who has been appointed as a temporary judge by the state Supreme Court.

"I think being in politics helps you to identify with people you were never exposed to, like when I went into the Army as a kid from Chicago," he says. Staying active in Committeeman Joe Berrios' 31st Ward organization on the Northwest Side even after he moved out to Arlington Heights 29 years ago keeps him in touch with the needs of that community, and that helps him become a better judge, he says.

"If you work for a law firm and you drive straight home every night and you don't get involved with a civic organization, you're missing out on something," Cortesi says. "When I grew up, my family lived on a budget. My dad got a $10 ticket, and that disrupted our family. I know what that is for a poor family to have to pay that."

Would the kind of North Shore blue-bloods with East Coast degrees that "merit selection" panels might pick be as sensitive to the needs of Chicago litigants as these guys? In most merit-selection states, the governor appoints judges. The ward bosses ask tongue-in-cheek whether Gov. Ryan would pick "cleaner" candidates than they do.

Such nice sentiments aside, it still turns the stomachs of the good government groups to hear good lawyers prostrate themselves before the ward bosses to become judges.

"Legal experience includes real-world experience in solving disputes," says David Melton, president of the Chicago

Council of Lawyers. "It shouldn't include such things as whether you've done doorbell ringing or arm-twisting for political candidates."

Technically, a primary election will be held in March at which these endorsed candidates could lose, but 80 percent of the time the voters merely ratify the ward bosses' anointed ones. Even less relevant is the November general election, in which no Republican has beaten a Democrat in a countywide judicial race in more than 10 years.

Another lawyer, Lori Wolfson, steps up to the podium. With 13 years as a county prosecutor and good ratings from all of the local bar groups, she stands poised to be elected the fourth openly gay judge on the Cook County bench. She also has been a precinct captain in Ed Kelly's 47th Ward organization on the Northwest Side for seven years.

Burke thinks this kid is terrific. He points out to everyone that she is the niece of Warren Wolfson, widely considered one of the best writers of opinions on the state appellate court.

He does not mention that she is the daughter of Dean ("Dean the Dream") Wolfson, a lawyer who served 71/2 years in prison for bribing judges.

After three hours of speeches from 50 candidates, Burke suggests that the committeemen recess until the following afternoon, when they will approve the final slate.

Ald. Patrick O'Connor adds, only half in jest, "I motion that all those slots not be filled in the interim." But, of course, they are. That night, the committeemen meet in small groups. They talk on the phone. And when they all get together again on Tuesday afternoon, it's a done deal--the slate was typed up even before the meeting started.

There is no discussion.

"All in favor, say aye," Burke calls out.

"Aye."

(2)

No. 01-1486

Supreme Court, U.S.
FILED

APR 4 2002

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

BEVERLY B. MANN,

Petitioner,

v.

THE UPJOHN COMPANY,

Respondent.

REPRINTED PORTION OF, AND SUPPLEMENT TO, APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT, AND THE ILLINOIS SUPREME COURT

REPRINTED: APP. C – ILLINOIS APPELLATE COURT ORDER

ADDED: APP. G – ARTICLE: JUSTICES REVAMP A KEY DISCOVERY RULE

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

25pp

INDEX TO REPRINTED PORTION OF, AND SUPPLEMENT TO, APPENDIX

Beverly B. Mann v. The Upjohn Company,
Jun. 29, 2001, No. 1-98-2343; *324 Ill. App. 3d 367; 753 N.E.2d 452; 257 Ill. Dec. 257* .....App. C

"Justices Revamp a Key Discovery Rule,"
Chicago Daily Law Bulletin, Mar. 28, 2002 .....App. G

As noted in a letter to Mann from assistant Clerk Gail B. Johnson dated April 11, 2002 (which Mann received on April 18), the following opinion erroneously printed in 9-point rather than in 12-point type in the Appendix included in the Petition.

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*2001 Ill. App. LEXIS 531, *; 324 Ill. App. 3d 367; 753 N.E.2d 452; 257 Ill. Dec. 257*

BEVERLY B. MANN, Plaintiff-Appellant and Cross-Appellee, v. THE UPJOHN COMPANY, Defendant-Appellee and Cross-Appellant.

No. 1-98-2343

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

324 Ill. App. 3d 367; 753 N.E.2d 452; 2001 Ill. App. LEXIS 531; 257 Ill. Dec. 257

June 29, 2001, Decided

SUBSEQUENT HISTORY: [*1] Rehearing Denied August 14, 2001. Released for Publication August 28, 2001.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County. Honorable Susan Zwick, Jacqueline Cox, Robert Bastone, Lynn Egan, Donald O'Connell, Judges Presiding.

DISPOSITION: Affirmed.

COUNSEL: FOR APPELLANT, Beverly B. Mann, Pro se, Chicago, IL.

FOR APPELLEE, Johnson & Bell, Ltd. (William V. Johnson, Thomas H. Fegan, of counsel, Chicago, IL, Shook, Hardy, & Bacon, L.L.P. (Stephen E. Scheve, Marie S. Woodbury, Thomas A. Sheehan, of counsel), Kansas City, MO.

JUDGES: JUSTICE BURKE delivered the opinion of the court. HALL, P.J., and WOLFSON, J., concur.

OPINION BY: BURKE

OPINION: JUSTICE BURKE delivered the opinion of the court:

Plaintiff Beverly Mann appeals from numerous orders of the circuit court granting summary judgment to defendant The Upjohn Company on counts I and II of plaintiff's complaint, granting summary judgment to defendant on count IV of plaintiff's amendments to her complaint, granting defendant's motion to dismiss count VII of plaintiff's amendments to her complaint, denying plaintiff's motion to amend her complaint, denying plaintiff's motions for continuance of the trial date, and denying plaintiff's motion [*2] to vacate the dismissal of her complaint for want of prosecution (DWP) Defendant cross-appeals from orders of the circuit court granting plaintiff's motion to amend her complaint following summary judgment on counts I and II, denying defendant's motion for summary judgment based on lack of expert testimony on causation, and denying defendant's motion for summary judgment on plaintiff's economic loss claims. For the reasons set forth below, we affirm.

STATEMENT OF FACTS

Plaintiff, an attorney, filed a *pro se* complaint against defendant alleging that she suffered physical and

psychological injuries as a result of her ingestion of a prescription drug, Halcion, from January 1988 to January 1990. Halcion, also known as triazolam, is a member of the benzodiazepine drug class and is a sleep aid used to treat insomnia. Defendant manufactures Halcion and the drug received the Food and Drug Administration's (FDA) approval and licensing in 1982. Numerous complaints similar to plaintiff's were filed against defendant across the country following various news magazine and newspaper articles, as well as a "20/20 Report" detailing adverse side effects of Halcion.

Plaintiff's complaint against [*3] defendant was based on claims of negligence (count I) and products liability (count II), and alleged that defendant failed to adequately warn her of the detrimental effects of Halcion. Plaintiff's complaint was subsequently removed to the federal district court based on diversity jurisdiction. Plaintiff was ordered two times by the district court to answer outstanding discovery and to sign medical authorizations. In August 1992, plaintiff voluntarily dismissed her federal complaint, but plaintiff was granted leave to refile it in state court. In October 1992, plaintiff retained an attorney who refiled plaintiff's complaint in the circuit court of Cook County. In addition to the claims against defendant, plaintiff added as defendants Dr. John Karesh, the doctor who prescribed Halcion for her, and NorthCare Medical Group, where Karesh worked, alleging medical malpractice (count III). In February 1996, the court granted summary judgment in favor of Karesh and NorthCare based on its determination that the claims against them were time barred by the applicable statute of limitations, and they are not parties to this appeal.

In early 1993, the trial court ordered plaintiff to answer interrogatories [*4] on two occasions. In November 1993, defendant filed a motion for sanctions based on plaintiff's

failure to comply with discovery. Although the trial court denied the motion for sanctions, the court ordered plaintiff to answer discovery. In the summer or autumn of 1994, defendant filed a motion to compel answers to interrogatories. The trial court's ruling on this motion is not contained in the record.

In May 1996, defendant filed three motions for summary judgment with respect to counts I and II of plaintiff's complaint; one based on lack of evidence of causation, one based on lack of evidence of loss of income claim, and one based on adequacy of warnings. On June 18, plaintiff's attorney was granted leave to withdraw as plaintiff's counsel. During the summer of 1996, defendant filed a motion for relief from plaintiff's personal attacks on counsel. Neither the motion itself, nor the trial court's decision, is in the record.

Plaintiff filed her first motion for a continuance of the trial date on October 22 in order to retain new counsel and to obtain defendant's Halcion database. Plaintiff was ordered on this date to answer Supreme Court Rule 213 interrogatories. 177 Ill. 2d R. 213. [*5] Thereafter, the trial court denied plaintiff's motion for continuance. At the hearing on this motion, the court questioned plaintiff about her discovery efforts and expressed its concern with respect to her diligence in prosecuting the case. The court stated that it had serious problems with whether plaintiff had done discovery and advised plaintiff that this was her "last chance." At this hearing, plaintiff accused defense counsel of being notorious for harassing plaintiffs. Plaintiff filed a motion to reconsider, which the trial court granted. The trial was continued from December 9, 1996, to August 21, 1997. Plaintiff was also ordered to answer Rule 213(g) interrogatories by January 3, 1997.

In December 1996, plaintiff replied to defendant's motions for

summary judgment, relying on various documentary evidence. In January 1997, defendant filed a motion to bar plaintiff from presenting expert testimony based on her failure to comply with the court's order requiring her to answer Rule 213(g) interrogatories. On February 25, the trial court granted defendant's motion for summary judgment on counts I and II, and on March 25, it denied plaintiff's motion to reconsider its February 25 [*6] order granting summary judgment.

On April 22, the trial court granted plaintiff's motion to amend her complaint, allowing her to add claims for fraud (count IV), negligence (count V), products liability (count VI), and battery (count VII) based on alleged misrepresentations made by defendant. Defendant's subsequent motion to reconsider the order allowing plaintiff to amend her complaint was denied. Defendant thereafter filed a motion to dismiss plaintiff's amendments to her complaint.

On June 18, the trial court granted defendant's motion to require plaintiff to submit to an independent medical examination (IME). This motion had apparently been pending for over a year. On June 20, plaintiff filed a motion to continue the trial date, contending that the case had been in suspension from February 25 (when summary judgment was granted on counts I and II of her complaint) until April 22 (when she was allowed to amend her complaint). In June, plaintiff filed a motion to compel production of the Halcion database, which the trial court subsequently granted on September 23. On July 1, plaintiff filed a motion to continue the trial date to retain counsel, which the trial court denied based [*7] on its determination that plaintiff had not been diligent in prosecuting her case and had not demonstrated good cause for a continuance. At the hearing, the court expressed to plaintiff its concern with her discovery efforts over the previous five years. Rather than answer the court's questions with respect to what discovery remained, plaintiff

engaged in an outburst and verbally attacked defendant. The court admonished plaintiff that it would not tolerate such conduct. Because of plaintiff's outburst, the court continued the matter to later that day. When the hearing resumed, the court indicated to plaintiff that her case was in jeopardy and that she had not answered Rule 213 interrogatories even though she had been ordered to do so. It then denied plaintiff's motion to continue.

Sometime during the summer of 1997, the FDA commissioned the National Academy of Sciences' Institute of Medicine (IOM) to conduct an independent review of Halcion. On July 9, the trial court granted defendant's motion to dismiss plaintiff's battery claim, but denied its motion to dismiss the negligence, fraud, and products liability claims. On July 10, the trial court granted plaintiff's motion to reconsider [*8] its order of June 18, requiring plaintiff to submit to an IME. However, on July 22, the trial court again granted defendant's motion for an IME. Plaintiff's motion to reconsider was denied and she underwent psychiatric and psychological examinations in August 1997. Thereafter, in an emergency motion for an extension of time to file a brief on her motion to compel production, plaintiff accused one of defendant's counsel of faking surgery for the purpose of delay.

On July 23, the trial court continued the trial date from August 21 to October 21, 1997, although the court did question plaintiff as to what discovery she had done and admonished her to answer the court's questions and cease being unresponsive. The court further indicated that plaintiff was in the position she was in with respect to discovery of defendant's documents due to her "own doings," *e.g.*, her failure to review the documents when they were produced in 1992. The court struck those portions of plaintiff's motion for an extension of time that dealt with attacks upon defense counsel. During the hearing, plaintiff also accused defense

counsel of lying to the court both at this hearing and on previous occasions and [*9] demanded a transcript of the hearing so she could respond in writing.

On September 13, the trial court entered an order barring plaintiff from presenting any opinion witnesses except those previously disclosed and deposed, e.g., plaintiff's treating physicians. On September 18, plaintiff filed a motion to continue the trial date based on her need to obtain the IOM report as well as defendant's 8,500 patient study of Halcion. On September 23, plaintiff filed another motion to continue the trial date based on the soon-to-be-released IOM report. At a hearing on this date, plaintiff accused defense counsel of lying to the court. The court warned plaintiff that it would censure her and told her there were to be no more attacks in her written memorandum on "how bad" defendant and defense counsel were. Plaintiff was further instructed that she was to cease her accusations that defense counsel was lying. The court advised plaintiff that it would strike her briefs in their entirety if she continued her conduct. On September 29, plaintiff amended her motion to continue. However, the motion was withdrawn based on plaintiff's pending motion to recuse Judge Cox for cause.

On October 3, plaintiff [*10] filed an amended motion to continue the trial date based on the forthcoming IOM report. Plaintiff supplemented this motion on October 7, alleging a history of unethical conduct on the part of defendant's attorney, including fabrication of data for defendant. The trial court granted plaintiff's motion to continue based on the recent disclosure by defendant of the IME reports and continued the trial from October 21 to November 4. On October 17, the trial court denied plaintiff's "Motion for Substitution of Judge." On October 24, plaintiff filed an emergency motion to continue the trial date based on the imminent release of the IOM, which the trial court denied. At this hearing, plaintiff again accused

defense counsel of making false statements to the court. Plaintiff was admonished about this as well as the fact that what occurred in other Halcion cases in Cook County and the fact that continuances were granted in other cases, as plaintiff argued, were irrelevant because each case was to be considered individually. The trial court also denied plaintiff's subsequent October 27 motion to continue the trial. On October 30, plaintiff advised defendant that she would not proceed to trial [*11] on November 4 and would allow the court to DWP her case.

On November 4, plaintiff renewed her motion to continue the trial date, which the court granted; however, the court noted that plaintiff had done little affirmatively to work up her case, in particular, to disclose witnesses to prove up liability. The court also transferred the case to Judge Zwick for all further proceedings. On November 13, the IOM report was released. On November 20, a status hearing was held at which time trial was set for February 23, 1998, and discovery was cut off as of December 23, 1997. At this hearing, plaintiff again accused defense counsel of making misrepresentations to the court and distorting the truth. Plaintiff demanded that she be allowed to respond in writing. On November 21, plaintiff was allowed to amend her complaint to add punitive damages claims.

Sometime in December, defendant filed a motion for summary judgment on plaintiff's fraud claim, apparently on the basis of preemption by federal law. Defendant also filed a motion for sanctions against plaintiff based on its contention that she violated a protective order entered in the case by sending defendant's Halcion database to an attorney [*12] in Texas. On December 27, defendant filed a motion to dismiss plaintiff's amendments to her complaint. On December 31, defendant filed a motion to bar plaintiff's fact witnesses because they were identified after the discovery cut off date,

their testimony was not disclosed by plaintiff, or they were opinion witnesses.

In December 1997 or January 1998, plaintiff had apparently arranged for two different attorneys to act as her counsel. However, both counsel later declined to represent plaintiff based on time constraints and the state of the record.

On January 9, 1998, defendant filed another motion for summary judgment on the fraud count, alleging that plaintiff had no evidence to establish reliance by the FDA on any alleged misrepresentations by defendant. On the same day, the trial court denied plaintiff's motion to amend her complaint, concluding that her proposed claims were based on failure to warn, a claim upon which defendant had been previously granted summary judgment.

On January 28, defendant filed a motion to have facts deemed admitted based on plaintiff's failure to answer defendant's request for admissions. On February 13, plaintiff filed an emergency motion to designate [*13] an opinion witness on causation, which plaintiff was later allowed to withdraw. On February 19, the trial court granted defendant's motion to bar fact witnesses. On February 23, the trial court continued the trial date to April 23. On March 3, the trial court denied defendant's motion to dismiss counts IV and V of plaintiff's complaint, but granted defendant's motion for a bill of particulars as to count IV. On March 6, plaintiff moved to supplement her response to one of defendant's motions for summary judgment with the November 13, 1997, IOM report. This request was denied on March 17. On March 27, the trial court granted defendant's motion for summary judgment on plaintiff's fraud count. Plaintiff filed an emergency motion to reconsider the grant of summary judgment to which she

attached various documents. The trial court denied plaintiff's motion to reconsider.

On April 21, plaintiff filed an emergency motion to continue the trial date to retain counsel, which the trial court denied. At

this hearing, plaintiff accused defense counsel of engaging in tactics to keep her from obtaining the assistance of counsel that she needed, *i.e.*, that defense counsel had persuaded an attorney [*14] who had agreed to represent plaintiff from representing her. Plaintiff also accused defense counsel of making substantial misrepresentations to the court. The trial court admonished plaintiff, warning her to stop her repeated interruptions of the proceedings and interruptions when others were talking, and to stop with her outbursts. Plaintiff renewed her motion to continue on April 23, which the trial court again denied. The following colloquy then occurred:
"MS. MANN: *** I am not prepared to proceed to trial. So I would assume that that means you will enter a dismissal for want of prosecution.

THE COURT: I guess I should make this more formal because I assumed something that was not true. For the record, is the defendant ready to proceed to trial?

MS. WOODBURY [defense counsel]: Yes, your Honor.

MS. SCHEVE [defense counsel] Yes, your Honor.

THE COURT: For the record, is the plaintiff prepared to proceed to trial?

MS. MANN: No, I am not.

THE COURT: Will you be prepared to proceed to trial any time this afternoon?

MS. MANN: No.

THE COURT: This court then has no other recourse then if the plaintiff is [un]prepared and unwilling to proceed at trial to dismiss the case. [*15]

***

The case is dismissed for want of prosecution."

Thereafter, the trial court granted defendant's motion for costs. Plaintiff then filed a handwritten motion to vacate the DWP, which the trial court denied, stating it would not vacate an order it had entered just five minutes previously. On May 8, plaintiff filed a motion to vacate the DWP pursuant to section 2--1301 of the Code of Civil Procedure (735 ILCS 5/2--1301 (West 1998)) and an emergency motion to withdraw the motion to vacate the DWP she had earlier filed. On May 22, plaintiff amended her motion to vacate and, on May 26, she filed a second amended motion to vacate as well as a motion to reconsider the trial court's order denying her motion to continue the trial date. On June 8, the trial court denied plaintiff's motion to vacate the DWP. The next day plaintiff filed a motion to reconsider the June 8 order and, on June 16, she filed an amended motion to reconsider. On June 17, plaintiff filed a corrected amended motion to reconsider, which was denied on June 18. On June 19, plaintiff filed a second amended motion to reconsider the order denying her motion to vacate the DWP and, sometime [*16] thereafter, she filed a third amended motion. On June 26, the trial court declined to hear plaintiff's third amended motion to reconsider. Plaintiff filed a notice of appeal on July 1, which

she amended on July 7. On July 7, plaintiff again requested that the court hear argument on her third amended motion to reconsider, and the trial court again declined to conduct a hearing on it. On July 14, defendant filed its cross-appeal.

ANALYSIS

Generally, dismissal of a case for want of prosecution is not a final order which can be appealed since a plaintiff has an absolute right to refile the case within one year of the

dismissal. *Wilson v. Evanston Hospital*, 257 Ill. App. 3d 837, 839, 629 N.E.2d 589, 196 Ill. Dec. 44 (1994). Pursuant to section 12--317 of the Code of Civil Procedure (735 ILCS 5/12--317 (West 1998)), where a plaintiff's action is dismissed for want of prosecution, the plaintiff has the option "to refile the action within one year of the entry of the DWP order or within the remaining period of limitation, whichever is greater." *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497, 693 N.E.2d 338, 230 Ill. Dec. 209 (1998). A "trial [*17] court's order denying the vacature of [a] DWP must also be nonfinal and nonappealable since there is an absolute right to refile following that order." Wilson, 257 Ill. App. 3d at 840. Similarly, a timely motion to reconsider the denial of a motion to vacate does not transform the DWP into a final and appealable order--this is simply a reaffirmation by the trial court of its earlier decision which in no way affects finality of the DWP. *Wilson*, 257 Ill. App. 3d at 840. Only after the one-year period for refiling has expired does a DWP become final and appealable. *Vaughan*, 181 Ill. 2d at 502. Plaintiffs, however, are only entitled to one refiling of a cause of action under section 13--217 following a voluntary dismissal. *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 164, 676 N.E.2d 634, 221 Ill. Dec. 831 (1997).

In the instant case, the general rule with respect to the nonfinality of DWPs is not applicable because after the trial court dismissed plaintiff's case for want of prosecution, plaintiff had no right to refile her cause of action since she had already had her one refiling under section 13--217 when she refiled her complaint [*18] in the circuit court in October 1992 following her voluntary dismissal of her complaint in the federal court. See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 105, 672 N.E.2d 1207, 220 Ill. Dec. 195 (1996). Accordingly, when the trial court dismissed plaintiff's entire complaint for want of prosecution on April 23, 1998, at plaintiff's voluntary request, and denied her motion to vacate the DWP on June 8, 1998, the dismissal was with prejudice and rendered the DWP order final. See *Danaher v. Knightsbridge Co.*, 56 Ill. App. 3d 977, 980, 372 N.E.2d 862, 14 Ill. Dec. 583 (1978) (order denying motion to vacate is final and appealable). In addition, because the rights of the parties were ascertained and absolutely fixed at the time the trial court denied the motion to vacate on June 8, the prior court orders granting summary judgment, dismissing count IV of plaintiff's complaint, and denying plaintiff's various requests for continuances, all of which were nonfinal orders that did not contain Rule 304(a) language, then became final orders. It was on June 8 that the litigation was terminated upon the denial of plaintiff's motion to vacate. Thus, all prior orders were subject to [*19] appeal and plaintiff's notice of appeal filed on July 1, 1998, was timely.

Because plaintiff's entire cause of action was dismissed for want of prosecution, the sole issue before this court is whether the trial court properly exercised its discretion in denying plaintiff's motion to vacate the dismissal of her complaint for want of prosecution. If the trial court did not abuse its discretion in denying the motion to vacate, the remaining

issues raised by plaintiff are rendered moot since the DWP order disposed of the entire cause of action.

Plaintiff contends that the trial court abused its discretion in denying her motions to vacate the DWP order by failing to consider the requisite criteria pursuant to section 2--1301 of the Code of Civil Procedure. According to plaintiff, a review of the transcripts of proceedings demonstrate that the trial court failed to analyze or state findings upon the required criteria for vacating an order. It is her contention that the overriding criteria is whether substantial justice was done and that section 2--1301, unlike section 2--1401 of the Code of Civil Procedure (735 ILCS 5/2--1401 (West 1998)), forbids consideration [*20] of due diligence. Plaintiff claims that the only thing she could do was let the trial court dismiss her case because she could not have proceeded to trial *pro se*. She contends that she prosecuted her case to the fullest extent of her abilities.

Pursuant to section 2--1301 of the Code of Civil Procedure, "the court may *** on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2--1301 (West 1998). The plaintiff, as the moving party, has the burden of establishing sufficient grounds for vacating the judgment. *In re Marriage of Ward*, 282 Ill. App. 3d 423, 432, 668 N.E.2d 149, 217 Ill. Dec. 964 (1996) "The primary concern in ruling on a motion to vacate is whether substantial justice is being done between the litigants and whether it is reasonable under the circumstances to proceed to trial on the merits." *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941, 719 N.E.2d 117, 241 Ill. Dec. 256 (1999). However, the court may also consider whether a meritorious defense exists, due diligence, the severity of the penalty as a result of the judgment, and the [*21] hardship to the nonmovant if required to proceed to trial. *Marren Builders*, 307 Ill. App. 3d

at 941-42. The trial court should consider all events leading up to the judgment. *Marren Builders*, 307 Ill. App. 3d at 943. "'What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.'" *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 932, 686 N.E.2d 1202, 227 Ill. Dec. 46 (1997), quoting *Widucus v. Southwestern Electric Cooperative, Inc.*, 26 Ill. App. 2d 102, 108, 167 N.E.2d 799 (1960). The guiding principle is to prevent dismissal when it would be unfair, unjust, and inequitable. *Kirk v. Michael Reese Hospital and Medical Center*, 275 Ill. App. 3d 170, 173, 655 N.E.2d 933, 211 Ill. Dec. 550 (1995).

"The decision to grant or deny a motion to vacate *** lies within the sound discretion of the trial court, and we will reverse only if the trial court abused its discretion." *Marren Builders*, 307 Ill. App. 3d at 941. A trial court abuses its discretion "when it acts arbitrarily without the employment of conscientious judgment or if its [*22] decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted." *Marren Builders*, 307 Ill. App. 3d at 941. "If reasonable persons could differ as to the propriety of the trial court's actions, then the trial court cannot be said to have exceeded its discretion." *Merchants Bank*, 292 Ill. App. 3d at 930.

In the instant case, we find that while dismissal is a severe penalty, under the circumstances of this case, existing from the beginning of the litigation, dismissal was a fair and just result, which did not deny plaintiff substantial justice. The record clearly reflects a lack of due diligence on the part of plaintiff, a complete refusal to follow established litigation procedures, and that plaintiff was certainly on notice as early as 1996 that her case was in jeopardy. From very early on, plaintiff refused to cooperate with discovery. She refused to answer interrogatories and requests for production of

documents, she refused to sign medical authorizations although ordered to do so at least twice by the federal district court, and she refused to provide her medical information and records to defendant [*23] even though such information was crucial to the issues in the case. Defendant was forced to bring several motions to compel as well as motions for sanctions against plaintiff based on her refusal to cooperate with discovery. In fact, plaintiff was ultimately barred from presenting any opinion witnesses except for her own treating physicians because of her refusal to answer Rule 213 interrogatories.

Plaintiff's refusal to follow established procedures for presenting, preparing, and trying her case also supports the trial court's decision. Plaintiff advised the court several times that it was her intent to have the case litigated in a manner that was different than most products liability cases were litigated. Plaintiff repeatedly refused to answer the trial court's questions during oral arguments. Plaintiff ignored the court's comments from early on that it was concerned with what efforts she was taking to move the case forward and that her position was in jeopardy. As early as October 1996, the trial court questioned plaintiff's diligence and discovery efforts. Such questioning was continued throughout the case by the various judges hearing plaintiff's motions when they expressed [*24] their concerns with her discovery efforts and manner of prosecution of her case. The judges' comments at the various hearings clearly made their concerns known to plaintiff with respect to the adequacy of her evidence and discovery efforts. Additionally, although the trial court attempted to apprise plaintiff of the procedures she needed to follow, plaintiff did not follow its suggestions and continued to argue to the trial court that she intended to try this case differently than other cases.

The numerous continuances and delays occasioned by plaintiff's conduct provide additional support for the trial court's decision. Although several of plaintiff's motions for continuances were based on her request to obtain counsel, we note that plaintiff herself chose to proceed *pro se* to protect her own interests and privacy. While we are not saying that plaintiff was not entitled to have counsel represent her, she voluntarily made the decision to initially proceed *pro se* and the case should not be further delayed in light of her insistence that she proceed *pro se*. See *Clewell v. The Upjohn Co.*, 1995 U.S. Dist. LEXIS 17988, No. 94-2383 (E.D. Pa. November 21, 1995).

Lastly, we find plaintiff's repeated [*25] attacks upon defendant's counsel, both during oral argument and in her written documents before the trial court, very disturbing. Plaintiff was advised by the trial court that her conduct was improper and she was admonished on numerous occasions to cease her conduct. Plaintiff ignored the court's admonishments and continued her attacks upon defense counsel. We also admonish plaintiff that such conduct was improper, as well as inexcusable.

In summary, the record in this case discloses a lack of cooperation by the plaintiff in obeying court orders, indifference to the trial court's advice and admonishments, repeated attempts to delay the proceedings, and a failure to follow the rules of proper procedure. Plaintiff was the architect of her own predicament, and her complaint now that she was denied substantial justice will not be heard by this court. *Francone v. Weigel Broadcasting Co., Inc.*, 79 Ill. App. 3d 991, 993, 398 N.E.2d 1114, 35 Ill. Dec. 164 (1979). The trial court indulged plaintiff and gave her many opportunities to proceed with her case, yet plaintiff did not avail herself of the court's indulgence. This case has lingered in the circuit court for six years and, after all the [*26] delays, refusals,

and lack of cooperation by plaintiff, it would not be reasonable to force defendant to proceed to trial. The trial court's decision to deny plaintiff's motion to vacate its DWP order was reasonably made to prevent further delays and expenses and to reach an end to this litigation. We conclude that substantial justice was done and that the trial court did not abuse its discretion in denying plaintiff's motion to vacate the DWP order. Because the trial court did not abuse its discretion and because all claims were dismissed by the court's DWP order, the remaining issues raised in this appeal are moot, as are those raised in defendant's cross-appeal.

CONCLUSION

For the reasons stated, we affirm the judgment of the circuit court of Cook County.

Affirmed.

HALL, P.J., and WOLFSON, J., concur.

The following article was published in the Mar. 28, 2002, edition of the Chicago Daily Law Bulletin. Mann no longer subscribes to that journal and was not of the Illinois Supreme Court's Mar. 28 announcement of its amendment to Illinois Supreme Court Rule 213 until after she filed her petition with this Court on April 4.

The amendment is pertinent to Questions 1 through 4 of the Questions Presented in Mann's petition because it illustrates that discovery controversies were exceedingly commonplace under the discovery rules during the time period relevant in this case and that the Illinois Supreme Court and (surely) the Illinois Appellate Court were well aware of that when those courts issued their respective rulings in this case.

The amendment is pertinent to Questions 4 and 5 of the Questions Presented in Mann's petition because the amendment *expressly acknowledges* the distinction between "independent expert witnesses" and "controlled expert witnesses," and codifies that acknowledgment.

CHICAGO DAILY LAW BULLETIN

Thursday, March 28, 2002
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JUSTICES REVAMP A KEY DISCOVERY RULE

by DANIEL C VOCK Law Bulletin staff writer

SPRINGFIELD -- The Illinois Supreme Court on Thursday announced it would change its rules governing discovery in civil litigation, creating three new categories of witnesses in an effort to ease the pretrial burden borne by litigants.

The high court adopted the recommendations of its Rules Committee over a competing proposal by a panel of the Illinois Judicial Conference. The changes, which take effect July 1, set forth different requirements for lay witnesses, independent expert witnesses and controlled expert witnesses.

Thursday's action marks the culmination of 21/2 years of work on Supreme Court Rule 213, which last was overhauled in 1996. The rule is designed to prevent unfair surprise at trial.

Some lawyers have maintained that under the existing rule, judges lack discretion in deciding disputes over expert witnesses. Attorneys also contend that Rule 213 has spawned an expensive and time-consuming cottage industry of discovery involving interrogations and depositions.

As amended, Supreme Court Rule 213 requires attorneys to disclose the "subjects" of testimony from lay witnesses -- people who offer only fact or lay testimony.

Committee comments adopted with the amendments suggested that the topics must be precise enough to give opposing parties reasonable notice regarding the nature of the testimony.

For example, simply disclosing that a witness will discuss "the accident" is not sufficient, but announcing that the witness will testify about the speeds of vehicles, the lighting at the scene and a description of the collision would suffice, the panel explained.

The second category of witnesses established under the revised rule is "independent expert witnesses." They offer expert testimony but are not the party, the party's current employee or the party's retained expert – a group that could

include doctors or police officers with knowledge beyond their initial investigations.

Parties must disclose the subjects of testimony from this group of witnesses, just as they would for lay witnesses. In addition, the new rule requires parties to identify the opinions they expect the witnesses to elicit but not in as much detail as required under the current rule.

"Experience has shown that the detailed-disclosure requirement is too demanding for independent expert witnesses," the Rules Committee explained.

The current language mandating that parties disclose the subject matter of expert witness testimony, the reasons for the expert's opinions and the expert's qualifications will still apply to the last category of witnesses created by the amendments -- the controlled expert witnesses.

That group encompasses parties, the employees of the parties and experts hired by the parties. Because such people are under the direct control of a party, it will be easy for the party to provide more detailed information about their testimony, the committee reasoned.

Along with the new classifications of witnesses, the high court adopted language that provides exceptions to the disclosure requirements for cross-examinations.

The justices also included a new provision written by the Rules Committee that states: "This rule is to be liberally construed to do substantial justice between or among the parties."

That statement came in reaction to what many in the

practicing bar described as "hard-line" interpretations that appeals courts imposed on the current Rule 213.

Those decisions were counterproductive to the purpose of the rule, which is to try cases on their merits after full and fair disclosure, said Patricia C. Bobb, a Chicago attorney who chairs the Rules Committee.

In its commentary, the panel explained that Rule 213 "is intended to be a shield to prevent unfair surprise but not a sword to prevent the admission of relevant evidence on the basis of technicalities."

But Steven R. Bordner, an associate judge in Knox County who chaired the Judicial Conference committee when it forwarded its own proposals to the high court, cautioned that the top court must offer its interpretations of the new language quickly in order for the rule to succeed.

"I think Rule 213 and former Rule 220 were both victims of a variety of interpretations at the Appellate Court level. With so many interpretations and so many exceptions, the rules became undermined. I hope that doesn't happen again," Bordner said.

The judge said the three categories of witnesses outlined in the new language would encourage unnecessary litigation on the boundaries between the classifications. The Conference's panel on discovery procedures recommended only two categories of witnesses.

The scaled-back disclosure requirements for independent expert witnesses could also open the door for surprises at trial, Bordner added.

The Galesburg judge said the changes that the high court

adopted reflected the concerns of the practicing bar more than the interests of members of the judiciary.

But Bordner's successor in heading the panel on discovery procedures, Cook County Associate Judge Joseph N. Casciato, said that the rule changes, on the whole, weren't all that different from the proposals forwarded by the judge's group.

Casciato called the amended rule "a good rule that helps the problem."

Bobb, the chair of the Rules Committee, said the changes were the result of "an awful lot of hard work" from lawyers, bar associations and judges over the last two years. "Everybody weighed in on this," she said.

(3)

Supreme Court, U.S.
FILED
MAY 8 2002
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No. 01-1486

In The

Supreme Court of the United States

BEVERLY B. MANN,

Petitioner,

v.

THE UPJOHN COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, First District

RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

On the first day of trial, petitioner announced that she would not proceed with trial and requested that the court dismiss her case for want of prosecution. Immediately after the court dismissed the case, petitioner moved to vacate the dismissal.

The question properly raised by this petition is:

Did the Illinois Court of Appeals correctly affirm the circuit court's order refusing to vacate the dismissing of petitioner's case for want of prosecution when petitioner, despite five trial continuances, refused to try her case on its scheduled date?

CORPORATE DISCLOSURE STATEMENT

In June 1996 the name of respondent the Upjohn Company was changed to Pharmacia & Upjohn Company. Its parent company, a publicly-owned corporation chartered in Delaware, is Pharmacia & Upjohn, Inc.

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STATEMENT OF THE CASE

This petition arises from a judgment of dismissal for want of prosecution entered by the Circuit Court of Cook County at the request of petitioner Beverly Mann, a licensed attorney. Petitioner requested entry of judgment against her on the first day of trial and then immediately requested that the circuit court vacate the dismissal. When the court refused, petitioner appealed to the Illinois Court of Appeals arguing that the trial court somehow erred in not vacating the very relief she requested. The court of appeals affirmed and petitioner unsuccessfully sought review in the Illinois Supreme Court.

Although petitioner's claims took many forms, the underlying case involves state-law allegations of personal injury. Petitioner alleged that her use of Halcion® Tablets, an FDA-approved prescription sleeping medication manufactured by respondent The Upjohn Company, caused her a host of injuries. She sued Upjohn in 1991, voluntarily dismissed the case in June 1992, and refiled the action in October 1992.

The circuit court initially granted summary judgment in favor of Upjohn on the grounds that "plaintiff . . . presented no evidence to support her assertion that . . . the alleged breach proximately caused this plaintiff harm." Over Upjohn's objection, however, petitioner was granted leave to file an amended complaint alleging several new claims. The circuit court later dismissed one of the new claims for failure to state a claim for relief and granted summary judgment in favor of Upjohn on another claim.

As the first of many trial dates approached, petitioner was not prepared for trial. At the hearing on her first motion for continuance, the court repeatedly asked petitioner about the progress of her discovery efforts. The court postponed the trial for some eight months, warning petitioner that she had better use the additional time wisely:

> I'm going to do the case management order because I have some serious problems with whether or not you have done any discovery and whether or not you've made any arrangements to do discovery. . . . This is your last chance.

Vol. 3 C 609.

At two subsequent hearings on petitioner's motions to continue the trial date, the court repeatedly asked what discovery had she performed, and what was left to do. The court stated succinctly "My concern is what have you been doing in the last five years? . . . Let me ask you this. What discovery remains?" Vol. 18 C 4292. The court concluded:

> Based on everything I've heard and based on the orders that I have reviewed starting with April 24, 1996, all the way through June 12, 1997, it appears to me that plaintiff has not diligently prosecuted this case and has failed to establish good cause for the continuance requested, consequently, the motion to continue trial is denied.

Id. at 4323.

At a subsequent hearing, the court again tried to determine what petitioner had done to prosecute her

case. Vol. 24 C 29. ("I'm curious about what you have done and what you haven't done. I still haven't gotten an answer from you.") The court summarized its impressions of petitioner's efforts to prosecute her case:

> Can you understand though the concern that I have dealing with a case that was filed originally in 1991 . . . and now we are talking about '97? Do you understand my concern that *perhaps this may be a lawsuit that you think is never ready to be tried*?

Id. at 30-31 (emphasis added).

Once again, the court granted petitioner additional time to prepare her case, with another stern warning:

> Understand this, this case will be tried. I hope you're ready. Whether you are or not it will be tried. I am not going to accede to your request and continue this matter until early '98. I will grant you a 60 days continuance to October 21. That is all I can afford you.

Id. at 31-32.

Despite the court's admonition, the trial was later continued again, first to February and then to April 1998. The only penalty petitioner received was another lecture from the trial court:

> When you were first assigned to complex litigation the amount of discovery that occurred in this case was, at best, minimal. We have worked very diligently for the last 18 months to get this case ready for trial, and on several occasions you represented to the Court that you are ready to go. Now on the eve of starting the pretrial motions and getting the case substantively

> ready for the jury you're telling me you're not ready. This is in direct contradiction to what you have been representing to the Court for at least a year. And in anticipation that this problem was going to arise when I was assigned the case and I set the trial date I warned both counsel that this schedule was going to stay intact because of the amount of work that has already been done and the representations of both counsel that the work was completed. Now you're telling me it's not.

Vol. 25 C 137-38.

Shortly before the fifth scheduled trial date, petitioner moved for another continuance and announced that if she were not accommodated she would allow the court to dismiss the case for want of prosecution. On the morning of trial, petitioner refused to proceed and again invited the court to dismiss her case for want of prosecution:

> For the reasons stated in my motion for trial date continuance today, and stated in my motion for trial date continuance on Tuesday, and my written statements and my oral statements on that date, I am not prepared to proceed to trial. So I would assume that that means you will enter a dismissal for want of prosecution.
>
> * * *
>
> THE COURT: For the record, is plaintiff prepared to proceed to trial?
>
> MS. MANN: No, I am not.
>
> THE COURT: Will you be prepared to proceed to trial any time this afternoon?

> MS. MANN: No.
>
> THE COURT: This court then has no other recourse then if the plaintiff is [un]prepared and unwilling to proceed at trial [then] to dismiss the case. . . . This case is dismissed for want of prosecution.

Vol. 26 C 24-25.

A few minutes later, petitioner realized that she might be liable for Upjohn's costs if the case were indeed dismissed for want of prosecution. A 229. She then told the court: "I made a mistake when I said I couldn't prosecute. If I have to prosecute to avoid some kind of huge judgment against me for costs, I'll do it. We will go through the motions, okay." Vol. 26 C 34. The court refused to "rule on a motion to vacate a DWP I entered less than *five minutes ago.*" *Id.* at 37 (emphasis added).

On appeal, the Illinois Court of Appeals held that the circuit court did not abuse its discretion in denying petitioner's motions to vacate the dismissal for want of prosecution. Pet. App. C-1-C-12. The court stated: "In summary, the record in this case discloses a lack of cooperation by the plaintiff in obeying court orders, indifference to the court's advice and admonishments, repeated attempts to delay the proceedings, and a failure to follow the rules of proper procedure. Plaintiff was the architect of her own predicament, and her complaint now that she was denied substantial justice will not be heard by this court." Pet. App. C-11.

REASONS FOR DENYING THE WRIT

I. Adequate State Law Grounds Exist for Affirming the Judgment Below.

The Court should deny the petition for two fundamental reasons. First, petitioner's failure to clearly explain her position alone is grounds for denying the writ. Supreme Court Rule 14.4. Second, petitioner's request for review of the court of appeal's opinion presents no question worthy of the Court's attention. State-law grounds exist for affirming the judgment below, and petitioner's vague allegations of constitutional violations do not present a substantial federal question.

Under Illinois law, petitioner could not appeal the circuit court's order dismissing her case for want of prosecution because she invited the court to do so. *See Edward E. Gillen Co. v. Lake Forest*, 581 N.E.2d 739, 741 (Ill. App. 1991); *see also J. L. Simmons Co. v. Firestone Tire & Rubber Co.*, 483 N.E.2d 273, 278 (Ill. 1985) ("It is fundamental to our adversarial process that a party cannot claim error when it induces the trial judge's mistake.")

Accordingly, petitioner's sole remedy was to appeal the denial of her motions to vacate the dismissal. In Illinois, this issue is subject to the abuse of discretion standard of review. *In re Marriage of Sheber*, 459 N.E.2d 1056, 1061 (Ill. App. 1984). One of the factors the Illinois courts consider is whether the movant exercised due diligence in prosecuting the underlying case. *Marren Builders, Inc. v. Lampert*, 719 N.E.2d 117 (Ill. App. 1999).

Whether petitioner satisfied the state-law standards is outside the Court's jurisdiction. The circuit court made

factual findings that petitioner did not show diligence in preparing her case for trial. The court of appeals affirmed those factual findings in a well-reasoned opinion. The Court should defer to the Illinois courts' decision. *See Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) (" 'when, as here, there can be no pretense that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision whether right or wrong.' " (Quoting *Nickel v. Cole*, 256 U.S. 222, 225 (1921)).

Petitioner's allegations that the Illinois courts violated her due process and equal protection rights are just that – allegations. The reality is that the courts cut through the blizzard of rhetoric unleashed by petitioner and reached a conclusion, based solely on state law, that petitioner had not shown diligence in preparing her case for trial and thus was not entitled to relief. Petitioner's dissatisfaction with the result does not make it a federal case.

Moreover, her complaints about a denial of substantive appellate review are illusory. The court of appeals spent twelve pages summarizing petitioner's obstructionist behavior and analyzing the propriety of the result reached by the circuit court. The Illinois Supreme Court's denial of further review is solely within that court's discretion. " '[I]t rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise.' " *Wolfe*, 364 U.S. at 195 (quoting *John v. Paullin*, 231 U.S. 583, 585 (1913).

Although appearing *pro se,* petitioner is a licensed attorney in the State of Illinois. It should have come as no surprise to her that the court of appeals would consider her repeated failures to comply with the Illinois rules when reviewing the judgment of the circuit court.

Because the judgment below can be affirmed on state-law grounds, the instant petition presents no issues worthy of the Court's time and attention. *See, e.g., Hedgebeth v. North Carolina,* 334 U.S. 806, 807 (1948).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 01-1486

IN THE

Supreme Court of the United States

BEVERLY B. MANN,
Petitioner,

v.

THE UPJOHN COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Illinois Appellate Court, First District

---

PETITIONER'S REPLY TO BRIEF OF RESPONDENT THE UPJOHN COMPANY IN OPPOSITION

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I. Introduction

Mann is convinced after reading Upjohn's three-page Argument in its Brief in Opposition that it's counsel believes that no member of any justice's staff will read Mann's petition, or will read even the six questions it presents, before first reading the brief in opposition to it. So Upjohn's strategy is to fail even to *acknowledge* any of the actual legal issues that the petition presents, and instead to feign a response to it by discussing phantom issues so banal, so obviously inappropriate for this Court's review, that after reading the brief in opposition to it no member of this Court's staff will even open the petition itself.

II. Upjohn Misrepresents the Express Holdings in Two Illinois Opinions, and the Grounds Upon Which Petitioner Appealed Below and Upon Which She Seeks Review By This Court; It Uses Its Brief in Opposition as a Decoy.

As a preliminary matter, Lake Forest has filed a motion in this court to dismiss the appeal or, in the alternative, to strike certain portions of Gillen's brief. Lake Forest contends this court lacks jurisdiction to hear the appeal because Gillen voluntarily dismissed the case. We disagree.

Lake Forest is correct in stating that as a general rule a plaintiff cannot appeal an order of voluntary dismissal. (See *Kahle v. John Deere Co.* (1984), 104 Ill. 2d 302.) An order of voluntary dismissal cannot be appealed by the plaintiff since he or she requested the order and thus is protected from prejudice by the statute of limitations which gives the plaintiff the absolute right to refile the action within one year of a voluntary dismissal without prejudice. (See Ill. Rev. Stat. 1989, ch. 110, par. 13-217; *Kahle v. John Deere Co.*, 104 Ill. 2d at 306.) *However, Gillen is not attempting to appeal the order for voluntary dismissal.* [Emphasis added.] Rather, Gillen is asking this

> court to review the court's dismissal of count IX based upon Lake Forest's motion to dismiss, as well as the court's granting judgment on the pleadings as to all damages relating to the sinking of the tug "Andrew J," which was also based upon a motion made by Lake Forest.

The above is an excerpt from *Edward E. Gillen Co. v. The City of Lake Forest*, 581 N.E.2d 739 (1991), which is one of two case authorities that Upjohn cites for its proposition at p. 6 that, "Under Illinois law, petitioner could not appeal the circuit court's order dismissing her case for want of prosecution because she invited the court to do so." But, of course, Mann *did not appeal* from the circuit court's order dismissing her case for want of prosecution, any more than did Gillen in *Gillen*. She appealed from summary judgments that were entered on several counts in her complaint *many months before* the circuit court entered its order dismissing her case for want of prosecution. She also appealed from the circuit court's two repeatedly-reiterated utterly off-the-wall and grossly expensive (and, for Mann, financially impossible) prerequisites to the grant of her motions for a single trial date continuance of sufficient length to enable her to retain trial counsel – which was what *rendered* her unable to try the case. And she appealed from the circuit court's *refusal to vacate* the dismissal for want of prosecution pursuant to 735 ILCS § 5/2-1301(e) and several Illinois supreme and appellate court cases that interpret that statute.

Indeed, a key issue in her appeal to the Illinois Supreme Court and her petition to this Court is precisely whether the Illinois Appellate Court's *refusal to consider* her appeal from those summary judgments that those judgments were entered before the dismissal of the remaining counts and were judgments on the substantive merits and unrelated to the later dismissals for want of prosecution, violated her Fourteenth Amendment rights to due process and equal protection of the law. Indeed, another key issue was, and is, whether the Illinois Appellate Court's *refusal to consider* her Fourteenth and Seventh Amendment challenges to the circuit court's

stated grounds for denying her repeated motions that sought a single trial date continuance without which she could not try the case constituted an violation of the Fourteenth Amendment. Indeed, another key issue was, and is, *whether* the circuit court's *stated grounds* for denying her repeated motions seeking a single trial-date continuance of at least three months (so that she could have trial counsel) *did* violate the Fourteenth and Seventh Amendments as she had claimed throughout; as Mann stated in her petition, one after another circuit judge told her on the record that those reasons, which countermanded a state statute, 735 ILCS § 5/2-1007, were *de facto* official policy of the county's court system, and in fact the chief judge himself confirmed it at a memorable hearing in this case on November 4, 1997.

But at the heart of her petition to this Court (as it was at the heart of her appeal to the Illinois Supreme Court) is the appellate court's stunning *sua sponte* litany of *its own conclusions of fact* concerning Mann's and Upjohn's counsel's conduct *during the trial-court stage* in the litigation.

Even were those conclusions of fact actually *supported* by the trial-court record, and they were not, they could not under Illinois law constitute grounds for the appellate court's refusal to consider Mann's appeal from the summary judgments entered on the merits and, on the basis of a court policy that Mann is challenging as unconstitutional, from the repeated denials of the trial-date continuance Mann needed in order to try the case. As Mann says in her petition, Illinois Supreme Court Rule 219 delineates the procedural due process for trial-court determinations of the sort that the appellate court in this case purported to make, and Illinois law provides no mechanism whatsoever for appellate courts to engage in such fact-finding. Nor does Illinois law provide for the *non sequitur* denial, of appellate review as a sanction even for *validly determined* judicial findings of fact of that nature. And these facts weren't even validly determined, nor determined by the trial court at all. Upjohn does not contest Mann's assertion that there were *no such trial-court determinations an that there were several trial court determinations. Specifically to*

the contrary. Nor does Upjohn challenge Mann's assertion that the appellate court lacked both the legal authority and the logisti-cal apparatus to *determine* issues of fact. Nor does it dispute her allegations of specific, egregious conduct on the part of its own counsel.

Mann's petition articulates these issues, yet Upjohn addresses *none* of them. Instead, Upjohn claims that the appellate court acted as in accord with Illinois law and that therefore its actions and the purported Illinois law to which it adhered cannot be challenged as unconstitutional. But if so, then Illinois law condones – in fact, requires – attorneys' to breach the state's codified procedural rules, as well to violate a few of canons of legal ethics. The appellate court cited, for example, Mann's having objected to several waves of Upjohn's torrential sets of interrogatories, for example, as a basis for its ruling that Mann was not entitled to appellate review or, for that matter, even appellate review of most of the rulings from which she had appealed; by objecting to Upjohn's sets of interrogatories, Mann had forced Upjohn to file a motion to compel her to respond to them, thus Mann was not entitled to a trial-date continuance or to appellate review of the summary judgments. It was of no moment that the trial court in fact had denied Upjohn's motion to compel, upon an express finding after looking at the interrogatories that, just as Mann had said when objecting to them, the sets of interrogatories exceeded exponentially the statutorily allowed number of interrog-atories. All that mattered to the appellate court was that Mann had objected to them, not whether the trial sustained the objection upon unequivocal tangible evidence that Mann's objection was warranted.

If breaching that Rule (time and again, as Upjohn did) and breaching the canons of legal ethics (as Upjohn's counsel did) effectuates the waiver *by the opposing party* of a necessary trial-date continuance, or of the right to appellate review on the merits of summary judgments, or of anything else, it would follow necessarily that counsel's *adherence to*, rather than breach of, those Rules constitutes malpractice.

Upjohn also misrepresents to this Court that Illinois law authorizes the trial court to vacate dismissals for want of prosecution only when the dismissal order was entered in error, a remarkable and knowing misstatement of both Illinois statute, extensive Illinois case authority, and trial court practice. In fact, the Cook County Circuit Court's Law Division, where this case was litigated, has a regular twice-weekly motion call that handles motions to vacate dismissals for want of prosecution *irrespective of whether the dismissal order was entered erroneously or not.* And as the pertinent statutes, 735 ILCS § 5/2-1301(e) and 735 ILCS § 5/2-1401, themselves state, and as very extensive appellate authority demonstrates, most orders dismissing cases for want of prosecution are *not* entered in error; they are entered because the plaintiff failed to appear at a hearing.

Nor, as the language quoted above from *Gillen* makes clear, does that opinion say or imply, as Upjohn represents, "that under Illinois law petitioner could not appeal the circuit court's order dismissing her case for want of prosecution because she invited the court to do so." *Gillen* says instead, "An order of voluntary dismissal cannot be appealed by the plaintiff since he or she requested the order and thus is protected from prejudice by the statute of limitations which gives the plaintiff the absolute right to refile the action within one year of a voluntary dismissal without prejudice." This refers to a procedural rule *inapplicable in Mann's case*, under *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497, 693 N.E.2d 338 (1998).

Counsel Marie Woodbury, whose name appears on Upjohn's Brief in Opposition, is well aware of *Vaughan*. She was questioned extensively about it at oral argument below, and the appellate court cited the pertinent portion of it in its opinion in this case.

In the same vein, Upjohn cites *J. L. Simmons Co. Inc. v. Firestone Tire and Rubber Co. Inc.*, N.E.2d 273, 108 Ill. 2d 106 (1985), for its proposition that, "It is fundamental to adversarial process that a party cannot claim error when it induces the trial judge's mistake." In *Simmons*, a party that

had offered a particular jury instruction *was asserting on appeal* that the trial court's decision to give that selfsame jury instruction constituted error. Upjohn's citation to *Simmons* thus further misrepresents to this Court that Mann had appealed below from – and is appealing here from – the entry of the order dismissing the case for want of prosecution, rather than from orders noted above from which she actually *was*, and *is*, appealing.

But surely it also is fundamental to the adversarial process that a party not file a Brief in Opposition with this Court that, however tiny, is downright permeated with bald inaccuracies presented in blatant bad faith.

Upjohn, citing *Gillen* and *Simmons,* claimed in its brief to the appellate court that Mann could not appeal from the circuit court's order dismissing her case for want of prosecution. That court, eager though it was to deny Mann even *consideration* of her appeal on the merits, disagreed.

Upjohn also contends, at least as preposterously and utterly without purported legal citation or theory, that Mann *could not challenge the federal constitutionality* of the circuit court's explicitly-stated prerequisites (stated to her as court policy) to a trial-date continuance: that the moving party have taken a *pro forma* minimum number of depositions, and have designated a *paid* opinion trial witness. Upjohn says at p. 6 that Mann's "sole remedy was to appeal the denial of her motions to vacate the dismissal," and that "[i]n Illinois, issue is subject to the abuse of discretion standard."

Upjohn also declares without legal citation or explanation that Mann *cannot challenge the federal constitutionality* of the appellate court's overt refusal to hear her appeals from the earlier-granted summary judgments., and that Mann cannot challenge the constitutionality of the appellate court's wholesale *sua sponte* unexplained conclusions of *fact* that contradict the trial court's findings and the tangible court record (including actual admissions by Upjohn's counsel, and clearly written documents) upon which those trial-court findings were based.

In short, Upjohn provides no legal authority or legal theory whatsoever in support of its odd claim that Mann could not challenge the federal constitutionality of Illinois law and of Illinois court policy and of Illinois court rulings in her case. In *the only sentence* in which Upjohn actually *acknowledges* that – oh, yeah, by the way – Mann alleges "that the Illinois courts violated her due process and equal protection rights," it tells this Court, at p. 7, not to consider the validity of those allegations because those allegations are allegations.

That's it. That's Upjohn's response to Mann's Fourteenth and Seventh Amendment argument – not a *summary* of Upjohn's response but the *entirely* of the response. Unless, that is, you count the misrepresentation on p. 8 that *Hedgebeth v. North Carolina*, 334 U.S. 806 (1948) precludes challenges to the constitutionality of a state law if the state law being challenged would, under state law, permit the state conduct being challenged.

Mann recognizes that Upjohn was not required to file a Brief in Opposition at all. But since it did file one, it was required to respond in good faith. It did not do that, and is using its right to file a Brief in Opposition as a tactic of subterfuge, as a decoy.

III. Upjohn Impliedly Misrepresents Portions of the Court Record.

In her petition to this Court, Mann recounted a few of the items on the appellate court's extensive list of its grievances against her in her handling of the case, grievances that that court cited as its grounds for its ruling. One of those grievances, as noted above, was that Mann had objected to some of Upjohn's blitzkrieg of discovery demands. Another was that she had withdrawn a motion to name a Harvard Medical School professor as an opinion witness. There were others that she mentioned in her petition and a few that she lacked the space there to mention, but these two specific instances serve well to illustrate several points. As Mann noted in her

petition, both instances arose because *Upjohn's* counsel consciously, tangibly violated discovery and ethical rules.

In the former instance, Upjohn's lawyers repeatedly violated codified discovery procedure, and Mann's objections to the interrogatories were sustained because the trial judge *looked at the tangible evidence* of the violation: the sets of interrogatories, most of which exceeded by nearly 200 the number of interrogatories allowed per set without prior court leave to serve them. In the latter instance, Mann withdrew her motion (for leave to name that physician as an opinion witness) moments after Upjohn's counsel stated at a hearing – with no prior notice to Mann – that her co-counsel had, at her request, phoned the physician and began questioning him and that the physician had made some statements in that conversation that contradicted Mann's claim concerning the casual relationship between the prescription drug at issue and her illnesses when using the drug. As Mann also said in her petition, that physician later that day told her that he indeed had made the comments to Upjohn's counsel but that he had done so in response to that attorney's specific representations of fact concerning the timing of certain matters. Those representations of fact were, verifiably, not true.

Mann noted in her petition that with respect to the former set of incidents, the court record reflected not only the tangible fact that Upjohn had, as Mann alleged, far exceeded the allowable number of interrogatories and that it had done so repeatedly, but also that the trial court had entered orders *sustaining* Mann's objections. She noted with respect to the latter incident that although there was no transcript of Mann's phone conversation with the physician, there *was* in the record a transcript of the hearing in which Upjohn's counsel had said *in contesting Mann's motion* that her legal associate had contacted the physician, a clear violation of Illinois procedural law and the attorney code of ethics. And she noted that she had memorialized in a sworn affidavit the substance of her own phone conversation with the physician, and had made that affidavit a part of the court record.

She commented that the appellate court failed not only to mention these facts and comparable facts concerning other items on its grievance list, but also failed to explain why it thought the incidents themselves were relevant to any issue on appeal; the court simply stated *that*, e.g., Mann had objected to some of Upjohn's interrogatories and thus that Upjohn was "forced" to file motions to compel in order to pursue the matters, and *that* Mann had withdrawn her motion regarding the Harvard physician. And because none of these incidents was (at least facially) related to the issues on appeal, and because that court did nothing more than simply recite those facts and say that therefore it was ruling against her, Mann was forced to argue in the alternative in her petition to this Court. Taking the appellate court's statements literally, she argues in her petition, the court was ruling that Mann's *appropriate invocation* of discovery objections (for example) justified the *denial* of her motions for trial-date continuance, the *denial* ultimately of her motion to vacate the dismissal order, and the appellate court's refusal to *consider* her appeal from the earlier-entered summary judgments. But because this is so obviously a *non sequitur*, the recitation of the neutral fact(s) when coupled with the bare conclusory statement of consequence actually, and intentionally, *implies* non-neutral facts *not* stated (and not accurate, had they *been* stated). The recitation that Mann objected to some of Upjohn's discovery demands, "forcing" it to file a motion to compel, *implies* inaccurately that the objection was *overruled* rather than sustained and was found to be frivolous and dilatory. The statement that Mann withdrew her motion concerning the physician *implies* inaccurately that she (rather than Upjohn's counsel) was acting improperly, either in filing the motion or in withdrawing it (the court is not clear on this).

Upjohn's curious selection of facts to include in its very short recitation employs exactly the same gimmick; it is veritably permeated with it. E.g., although Upjohn (apparently) concedes that only the first of the five trial-date continuances was of sufficient *length* to enable Mann to retain trial counsel, it misrepresents (at p.2) that that first trial-date

continuance in fact could have enabled Mann to retain counsel. But, as Mann said in her petition, because the trial judge had *granted summary judgment* on the only two counts then remaining, the lawsuit *was procedurally dead* during the *middle four months* of that eight-month-continuance time period, so until the court granted Mann's motion pursuant to 735 ILCS § 5/2-1005(g) to file additional counts *there was no pending lawsuit.* This, in fact, was *exactly what Ms. Woodbury told the chief county judge* at the above-referenced November 4, 1997, hearing when he asked her why Upjohn had not used those months to conduct the discovery that it *later* demanded.

Mann had filed the first of her unsuccessful trial-date-continuance motions *immediately after* Upjohn's motion for reconsideration of the reinstatement of the case was denied and seven weeks before the trial date that was set at that the October 29, 1996, hearing. By citing the "2005" judge's comments when setting that trial date, that Mann had better use the eight-month continuance wisely, Upjohn misrepresents that Mann was acting unwisely rather than in necessary compliance with the procedural reality after the entry of the summary judgments that temporarily ended the entire case in the trial court – as if that judge had foreseen the summary judgments later entered by another judge and did not think this intervening event significant.

Similarly, Upjohn implies falsely, at p. 5, that Mann was acknowledging fault when she "realized" a few minutes after the order was entered dismissing the case for want of prosecution that "she might be liable for Upjohn's costs if the case were indeed dismissed for want of prosecution". Mann "realized" this because Upjohn's counsel, Stephen Scheve, without prior notice to Mann moved orally for costs, rattling off a citation to some procedural statute that Mann was unfamiliar with. Ms. Woodbury was present. The judge took the motion under advisement and later denied it.

This apparently is an increasingly common type of ruse by appellate parties and appellate courts alike. In common parlance, it's known as fraud.

Respectfully submitted,

Beverly Mann

(5)

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ADDENDUM REGARDING ONE OF UPJOHN'S MISREPRESENTATIONS

Throughout her Reply to Upjohn's Brief in Opposition, Mann discusses a preeminent repeated tactic that the appellate court in its opinion, and Upjohn in its Brief in Opposition, employ: They cite a neutral but irrelevant fact in order to imply a particular non-neutral but false fact. The reader will presume that the cited fact is relevant and thus infer the intended non-neutral meaning because, absent the non-neutral meaning, the conclusion that supposedly follows from the stated fact actually would be a *non sequitur* to it. The appellate court used some accurate and some inaccurate neutral facts in this manner. Upjohn, on the other hand, used only accurate neutral facts to this end.

At p. 10 of her Reply, Mann notes Upjohn's reference at p. 5 to her impromptu motion to vacate the order of dismissal for want of prosecution a few minutes after that order was entered. Upjohn said Mann's reason was that she "realized" a few minutes after the order was entered dismissing the case for want of prosecution that "she might be liable for Upjohn's costs if the case were indeed dismissed for want of prosecution." But, as Mann said in her Reply, she had "realized" this because Upjohn's counsel, Stephen Scheve, without prior notice to Mann moved orally for costs, rattling off a citation to some procedural statute that Mann was unfamiliar with.

Upon reading that portion of Upjohn's brief, Mann was perplexed about Upjohn's purpose in citing that incident. Although Mann indeed had moved to vacate the order of dismissal five minutes after it was entered, and although, as Upjohn says, the judge refused to "rule on a motion to vacate a DWP I entered five minutes ago," *that was not the motion to vacate the DWP that was at issue on appeal.*

The judge, as unfamiliar as was Mann with the obscure statute Mr. Scheve had cited regarding costs, called a recess in order to retire to chambers and read the statute. Mann used that recess (of roughly ten minutes) to handwrite a two- or three-paragraph motion to vacate the dismissal order and to handwrite a copy of it to hand to Mr. Scheve. When the hearing resumed, Mann presented the handwritten motion. Upjohn accurately states the judge's response to it.

After the hearing ended, Mann filed her handwritten motion with the court clerk's office, so that motion is a part of the court record. But a few days later, she also filed a very lengthy (more than 20 pages, if she recalls correctly) amended motion to vacate the dismissal order pursuant to 735 ILCS § 5/2-1301(e). The motion recited the series of the events that lead her to request the dismissal for want of prosecution. It also noted, as Mann had orally earlier, that because there was a routine lag time of three or four months for trial date continuances, due to the backlog of cases scheduled for trial, Mann's case would then simply be placed into the trial-date queue and assigned a trial date three or four months hence. This would enable her to retain trial counsel and try the case.

So why did Upjohn cite Mann's handwritten motion to vacate the dismissal, and the narrow reason she stated in that motion, yet fail to mention the amended motion that she filed a few days later? Well, Mann thought when she drafted her Reply that Upjohn's purpose was to suggest that she was acknowledging fault by her "[realization] that she might be liable for Upjohn's costs if the case were indeed dismissed for want of prosecution."

But Mann now realizes that Upjohn's main purpose was to imply, falsely, that all that was at issue in Mann's appeal from the denial of her § 5/2-1301(e) motion was the denial of that impromptu motion. That's why the sentence in Upjohn's Reply immediately following the recitation of that incident reads, "On appeal, the Illinois Court of Appeals held that the

circuit court did not abuse its discretion in denying petitioner's motions to vacate the dismissal for want of prosecution."

The appellate court pretended that all that was at issue in the appeal itself was the denial of Mann's § 5/2-1301(e) motion – not the earlier-entered summary judgments, not the denials of Mann's trial-date-continuance motions and the stated policy grounds upon which those motions were denied, not anything except the denial of the § 5/2-1301(e) motion. Upjohn in turn takes this deceit a step further, by suggesting to this Court not only that the denial of the § 5/2-1301(e) motion was all that was at issue in the appeal but that Mann's spontaneous initial § 5/2-1301(e) motion (presented in the circumstances described above) was the sum and substance of the § 5/2-1301(e) motion at issue on appeal.

Mann supposes that she should have recognized this upon her first reading of Upjohn's brief, and given her lengthy experience in fielding exactly this type of thing in this litigation she wonders why she did not. This epiphany occurred to her on May 24, while she was driving her car. She pulled to the side of the road, phoned this Court's clerk's office and spoke with a supervisory clerk (she thinks, but is not sure, it was Francis Lorson). She asked whether she could file a motion to strike the Brief in Opposition on the basis that it misrepresented which orders she had appealed from in the lower appellate court; she explained that she already had filed her reply to the brief and had identified several of the misrepresentations but now realized that there was another significant one. She was advised to file a supplement to her Reply instead.

Respectfully submitted,
Beverly Mann